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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY ROSENFELD,

Petitioner,

v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

A debtor acquired real property in Virginia, and, as part of the acquisition, entered into an agreement to pay monthly cooperative assessments (which are similar in nature to homeowner's association dues). Thereafter, the debtor filed for Chapter 7 bankruptcy relief and received a discharge for all of his debts. The Cooperative Association seeks to collect assessments assessed after the date of discharge from the debtor personally instead of enforcing its *in rem* remedies.

Is a debtor's personal liability for post-petition cooperative assessments an unmatured contingent "claim" as defined by 11 U.S.C. §101(12), and therefore discharged pursuant to 11 U.S.C. §524?

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1. *In re Jeffrey Rosenfeld,* No. 90-12716-AT, slip op. (Bankr. E.D.Va. September 25, 1992).
2. *Board of Directors of River Place East Housing Corporation v. Jeffrey Rosenfeld,* No. 93-58-A, slip op. (E.D.Va. April 26, 1993).

3. *River Place East Housing Corporation v. Jeffrey Rosenfeld*, ___ F.3d. ___ , 1994 U.S. App. Lexis 9722 (4th Cir. May 4, 1994).

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on May 4, 1994. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on June 2, 1994. Jurisdiction is conferred on this Court by 28 U.S.C.S. §1254(1) (Law. Co-op 1988).

STATUTES INVOLVED

This case involves the following statutory provisions:

11 U.S.C. §101(5) (Collier 1992)

11 U.S.C. §101(12) (Collier 1992)

11 U.S.C. §523 (Collier 1990)

11 U.S.C. §524(a)(1) (Collier 1986)

11 U.S.C. §524(a)(2) (Collier 1986)

11 U.S.C. §727(b) (Collier 1978)

Va. Code Ann. §55-472 (Michie 1990)

The text of these provisions and related sections are reproduced in the Appendices G-K, at 54a-90a.

STATEMENT OF THE CASE

INTRODUCTION

In 1983, the Petitioner, Jeffrey Rosenfeld (hereinafter "Rosenfeld"), purchased an interest in a cooperative unit ("Unit") in River Place East Housing Corporation as an investment. (3a). Rosenfeld purchased the Unit by, in

part, executing and accepting the assignment of the Proprietary Lease Agreement ("Proprietary Lease"), and thereby became obligated to personally pay cooperative assessments which were to be assessed against the Unit. The obligation to pay assessments arose under both the Proprietary Lease and pursuant to the Declaration of Covenants, Easements, and Liens ("Declaration") recorded in the land records of Arlington County, Virginia (to which Rosenfeld agreed to be bound by accepting the assignment). (3a-4a).

Rosenfeld filed a Chapter 7 bankruptcy case in November of 1990, and obtained a Chapter 7 discharge on February 2, 1991. Subsequent to Rosenfeld's Chapter 7 discharge, River Place East Unit Housing Corporation ("River Place") filed suit in a Virginia state court to collect post-petition cooperative assessments. (4a). Rosenfeld filed a Motion for Contempt in the Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, to enjoin these collection efforts.

The state court stayed the proceedings pending review by the Bankruptcy Court. The Bankruptcy Court granted Rosenfeld's Motion for Contempt and held that the post-petition assessments were discharged. (1a-12a). The United States District Court for the Eastern District of Virginia reversed the ruling, and the Fourth Circuit Court of Appeals affirmed the District Court. (13a-14a, 40a-51a). The Bankruptcy Court was conferred with jurisdiction pursuant to 28 U.S.C.S. §1334 (Law. Co-op. 1984 & Supp. 1990) and 28 U.S.C.S. §157 (Law. Co-op. 1986).

BACKGROUND

Rosenfeld purchased the rights to a unit in a cooperative apartment complex from Monument Associates as an investment on January 12, 1983. Rosenfeld acquired these rights to the Unit by executing and accepting an Assignment of Lease ("Assignment"), at which time he became obligated to pay assessments to River Place.[1] The obligation to pay cooperative assessments is specified in the Proprietary Lease and in the Declaration. Rosenfeld's obligation to pay the cooperative assessments arose at the time he executed and accepted the Assignment and assumed the obligations of the Proprietary Lease and Declaration.[2] (4a). The Proprietary Lease, as well as the Declaration, obligates owners of cooperative interests to pay monthly assessments for units in River Place.

Rosenfeld obtained financing for the purchase of the Unit from Trustbank Savings, F.S.B. ("Trustbank"). Rosenfeld provided Trustbank with a first Deed of Trust on the Unit. (4a).

Rosenfeld's financial situation began deteriorating in 1989, and he defaulted on, among other debts, the payment of his assessment obligations. River Place suspended Rosenfeld's right to use the common areas. The Unit became vacant prior to October of 1990 and remains empty to date. Rosenfeld subsequently filed

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[1] Rosenfeld's interest in the Unit consisted of an ownership interest in the cooperative association coupled with a possessory interest in Unit 902.

[2] The Proprietary Lease is the agreement between River Place and Rosenfeld that grants Rosenfeld a possessory interest in the Unit and requires him to pay cooperative assessments. The Declaration is the instrument which created the cooperative real estate project, known as River Place, in which the Unit is located.

for Chapter 7 bankruptcy relief on October 22, 1990. (4a).

During the pendency of Rosenfeld's bankruptcy case, Trustbank filed for relief from the automatic stay in order to foreclose on the Unit. Rosenfeld signed a consent order granting Trustbank relief from the stay. (4a). The Bankruptcy Court granted Rosenfeld a discharge under 11 U.S.C. §727 (Collier 1978) on February 13, 1991. To date, neither Trustbank nor its successors have foreclosed upon the Unit. (4a).

River Place continued to assess monthly cooperative assessments against Rosenfeld, and River Place filed suit in the Circuit Court of Arlington County, Virginia ("State Court") to collect all assessments made after the date Rosenfeld filed for bankruptcy. (4a-5a). While River Place had, and continues to have, *in rem* rights available to it, River Place chose to proceed against Rosenfeld personally.[3]

Rosenfeld filed responsive pleadings in State Court, and then filed a Motion for Contempt in the Bankruptcy Court for the Eastern District of Virginia in June of 1992, alleging River Place violated the permanent injunction against collection of a discharged debt granted by 11 U.S.C. §524(a) (Collier 1986). (3a, 78a). The State Court stayed the proceedings pending a decision by the Bankruptcy Court.

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[3] River Place has numerous *in rem* remedies available to it under the Proprietary Lease and Va. Code Ann. §55-472 (Michie 1990), including eviction in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, foreclosure, and the ability to seize and rent the Unit. (86a-90a).

The Bankruptcy Court granted the Motion for Contempt and enjoined River Place from pursuing any additional collection activities. (1a-2a). The Bankruptcy Court concluded that Rosenfeld's personal liability for post-petition assessments was discharged because the assessments constituted an unmatured and *contingent* obligation that was included within the broad definition of the terms "debt" and "claim" contained in 11 U.S.C. §101(12) (Collier 1992) and 11 U.S.C. §101(5) (Collier 1992), respectively. (8a-9a, 55a-57a). The Bankruptcy Court reasoned that River Place's right to payment for future assessments arose when Rosenfeld contracted to purchase his cooperative interest, and the payment of dues was contingent upon Rosenfeld's continued ownership of that interest. (8a-9a). In making its ruling, the Bankruptcy Court specifically rejected the line of cases holding that post-petition assessments were not discharged because they arose from covenants that run with the land. (6a-7a). The Bankruptcy Court also found River Place had broad *in rem* remedies to collect assessments assessed against the Unit.[4] (10a-11a).

River Place appealed to the District Court, which reversed the Bankruptcy Court's decision. (13a-14a). The District Court held that the obligation to pay assessments arose post-petition. (37a). As a result, according to the District Court, the assessments were not discharged. (37a). Rosenfeld appealed the District Court's decision.

The Fourth Circuit Court of Appeals upheld the decision of the District Court in an Opinion dated May 4,

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[4]The Bankruptcy Court also found that the evidence clearly established that the debtor wanted to be rid of this albatross but could find no one willing to foreclose or willing to take title. (6a).

1994. (40a-51a). A Petition for Rehearing and Suggestion for Rehearing In Banc filed by Rosenfeld was denied on June 2, 1994. (52a-53a).

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals conflicts with:

a) a decision by the Seventh Circuit Court of Appeals;

b) decisions of this Court; and

c) decisions by the Supreme Court of Virginia.

Furthermore, the issue of the dischargeability of post-petition cooperative (and condominium) assessments affects the ability of most debtors to obtain the "fresh start" intended by Congress. Under the current law, dischargeability of the assessments is determined by the jurisdiction in which the debtor declares bankruptcy. If the debtor declares bankruptcy in the Seventh Circuit, the debt is discharged. However, in jurisdictions such as the Fourth Circuit, the debt is not discharged. A decision by this Court is needed to settle the conflict between the circuits and enable debtors to obtain a "fresh start."

I.
THE DECISION BY THE FOURTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND THIS COURT REGARDING THE DISCHARGEABILITY OF HOMEOWNER'S ASSOCIATION ASSESSMENTS.

The Fourth Circuit Court of Appeals ("Fourth Circuit") in this case held that an association's claim for post-petition assessments does not arise until the assessments are assessed. (49a). According to the Fourth Circuit, the obligation to pay assessments is a covenant that

runs with the land and is thereby a function of owning the land with which the covenant to pay assessments runs. (46a). The Fourth Circuit reasoned that the obligation to pay the assessments arose out of Rosenfeld's post-petition ownership of the Unit, and not from Rosenfeld's pre-petition contractual obligations. (46a).

A. A Direct Conflict Exists Within The Circuits As To Whether Homeowner's Association Assessments Are Discharged.

The Seventh Circuit and many bankruptcy courts addressing the identical issue presented in this case have arrived at a contrary result, holding that post-petition assessments are discharged. The Seventh Circuit, in *In re Rosteck,* 899 F.2d 694, 697 (7th Cir. 1990), held that post-petition condominium assessments are discharged because the right to payment arises from a pre-petition contract.

The Court in *In re Rosteck, id.* at 696, utilized the same analytical framework used by the Bankruptcy Court in this case. The Seventh Circuit found that a "discharge" (granted under 11 U.S.C. §727) applies to all "claims." (82a-85a). The term "claim" is defined by 11 U.S.C. §101(12) as a "right of payment" whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent,* matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Emphasis added). (55a-56a). Association assessments that are assessed post-petition are a "claim" because: (a) the right to payment existed or arose at the time the debtor acquired the unit and agreed to become obligated under the underlying ownership documents; and (b) the obligation is unmatured, and is contingent upon, among other things, continued ownership.

Bankruptcy courts sitting in other circuits are also split on this issue, with approximately half the courts holding that post-petition assessments are discharged, and the remainder of the courts holding that the assessments are not discharged.[5]

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[5]The following courts have held that post-petition assessments are discharged:

Lower Courts in the Third Circuit: *In re Miller*, 125 B.R. 441, 443 (Bankr. W.D. Pa. 1991);

Lower Courts in the Fourth Circuit: *In re Hodge*, Case No. 90-10275-AT, slip op. (Bankr. E.D. Va. July 20, 1992);

Lower Courts in the Seventh Circuit: *In re Elias*, 98 B.R. 332, 337 (Bankr. N.D. Ill. 1989); *In re Montoya*, 95 B.R. 511, 514 (Bankr. S.D. Ohio 1988); *In re Behrens*, 87 B.R. 971, 975 (Bankr. N.D. Ill. 1988);

Lower Courts in the Eighth Circuit: *In re Affeldt*, 164 B.R. 628 (Bankr. D. Minn. 1994);

Lower Courts in the Ninth Circuit: *In re Cohen*, 122 B.R. 755, 758 (Bankr. S.D. Cal. 1991);

Lower Courts in the Tenth Circuit: *In re Turner*, 101 B.R. 751, 754-55 (Bankr. D. Utah 1989); and

Lower Courts in the Eleventh Circuit: *Matter of Wasp*, 137 B.R. 71, 73 (Bankr. M.D. Fla. 1992).

The following courts have held that post-petition dues are not discharged:

Lower Courts in the Second Circuit: *In re Raymond*, 129 B.R. 354, 365 (Bankr. S.D. N.Y. 1991);

Lower Courts in the Third Circuit: *In re McNeil*, 128 B.R. 603 (Bankr. E.D.Pa. 1991)

Lower Courts in the Fifth Circuit: *In re Hill*, 100 B.R. 907, 909 (Bankr. N.D. Ohio 1989);

Lower Courts in the Seventh Circuit: *In re Harvey*, 88 B.R. 860, 862 (Bankr. N.D. Ill. 1988);

Lower Courts in the Tenth Circuit: *In re Rink*, 87 B.R. 653, 654 (Bankr. D. Colo. 1987); *In re Horton*, 87 B.R. 650, 652 (Bankr. D. Colo. 1987); and

Lower Courts in the Eleventh Circuit: *In re: O'Mara*, 141 B.R. 227 (Bankr. M.D. Fla. 1992).

Guidance from this Court is needed to settle the dispute once and for all.

B. The Decision By The Fourth Circuit That Homeowner's Association Assessments Are Not Discharged Conflicts With Rulings By This Court.

The Fourth Circuit, in determining that Rosenfeld's obligation to pay post-petition cooperative assessments was not discharged, incorrectly: (a) applied state law and examined the nature of the obligation, rather than using federal law to determine whether or not the obligation to pay assessments consists of a dischargeable debt, and (b) failed to apply the broad definition of the terms "claim" and "debt" mandated by Congress and reaffirmed repeatedly by this Court. The Fourth Circuit's application of state law, and its narrow construction of the terms "claim" and "debt," are in conflict with the decisions of this Court in *Vanston Bondholders Protective Com. v. Green,* 329 U.S. 156, 162 (1946); *Johnson v. Home State Bank,* 11 S.Ct. 2150, 2154 (1991); and *Pennsylvania Dept. of Public Welfare v. Davenport,* 110 S.Ct. 2126, 2131 (1990). Had the Fourth Circuit applied federal law, and had it utilized the broad definitions of the words "claim" and "debt", the Fourth Circuit would have found that the post-petition cooperative assessments have been discharged.

This Court has clearly ruled that federal bankruptcy law, and not state law, determines what claims are discharged in bankruptcy. *Vanston Bondholders Protective Com. v. Green,* 329 U.S. at 162. The federal law applicable in this case is both: (a) the Bankruptcy Code definition of what is a "claim" and "debt"; and (b) the interpretive framework by which the terms "claim" and "debt" are to be construed.

As noted previously in Section I (A) of this Petition, the Bankruptcy Code defines both the term "debt" and the term "claim." 11 U.S.C. §101(12); 11 U.S.C. §101(5). In interpreting what these terms mean, this Court has repeatedly reaffirmed Congress' intent to have the "broadest possible" definitions in determining whether or not a particular obligation is a "claim" that should be viewed as discharged. *Johnson v. Home State Bank,* 111 S.Ct. at 2154; *Pennsylvania Dept. of Public Welfare v. Davenport,* 110 S.Ct. at 2131.[6]

Applying the broad definition of the word "claim" to cooperative assessments means that courts should decide whether the "right to payment" came into existence prior to the debtor filing for bankruptcy. In the case of cooperative assessments, the "right to payment" first arises when the debtor first becomes obligated to pay all future assessments. For example, in the instant case, the obligation arose when Rosenfeld purchased the Unit and assumed the obligations imposed upon him by the Proprietary Lease and the Declaration. After the debtor first assumes the obligation, all subsequent assessments, including the post-petition assessments, constitute "unmatured" assessments that are "contingent" both upon the continued ownership of the property by the debtor and upon the act of assessment by the association.

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[6]The legislative history in respect to the definition of "claim" states that:

> "By this broadest possible definition, . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."

S. Rep. No. 989, 95th Cong., 2nd Sess. 21-22 (1978).

As such, all assessments made after the filing of the debtor's petition fall within the definition of a "claim" and are discharged.

The Fourth Circuit did not follow the above analytical framework mandated by this Court, and incorrectly concluded that the post-petition cooperative assessments were not discharged. The Fourth Circuit improperly applied state law to determine that the basis for the debt was a covenant that runs with the land, and construing the concept of a "claim" narrowly, incorrectly concluded that a "claim" arising from a covenant that runs with the land somehow arises anew each time the assessments are assessed. The Fourth Circuit should have determined that the "claim" arose on the date Rosenfeld agreed to become subject to River Place's right to make such assessments. Therefore, the Fourth Circuit's decision contradicts the mandates of this Court as stated in *Vanston Bondholder's Protective Com. v. Green, Johnson v. Home State Bank,* and *Pennsylvania Dept. of Public Welfare v. Davenport.*

II.

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT OF VIRGINIA REGARDING THE DISCHARGE OF PERSONAL LIABILITY FOR HOMEOWNER'S ASSOCIATION ASSESSMENTS.

This Court, in *Johnson v. Home State Bank, supra,* at 2154, and the Supreme Court of Virginia in *Gregory v. Peoples,* 80 Va. 355, 357 (1885), have held that a bankruptcy discharge severs the *in personam* liability of the debtor from the *in rem* liability imposed upon the land. (93a-94a). In the instant case, the Fourth Circuit, without explanation, failed to sever the personal liability

from the *in rem* liability in violation of established principles of federal bankruptcy law.

The Supreme Court of Virginia has explained that covenants that run with the land create two different bases of liability for the covenantor. *Old Dominion Iron and Steel Corp. v. VEPCO,* 215 Va. 658, 667, 212 S.E.2d 715, 722 n.5 (1975). First, the covenantor has a direct contractual relationship with the covenantee, which imposes personal liability upon the covenantor. Second, the covenantor is in privity of estate with the covenantee, and courts treat this as a contractual burden that attaches to the land and affects subsequent assignees. *Id.* 215 Va. at 667, 212 S.E.2d at 722, n.5.

Gregory v. Peoples, supra, at 357, involved the dischargeability of personal liability from a covenant running with the land. In *Gregory,* a seller/debtor conveyed property by general warranty deed to a purchaser at a time when the seller/debtor did not have full title to the property. The purchaser sued for damages, and the seller/debtor obtained title subsequent to bankruptcy. The Supreme Court of Virginia held that the covenant of title ran with the land, but that the covenant was not related to the issue of personal (*in personam*) liability of the seller/debtor, which was discharged. *Id.* at 357. (93a-94a).

Another case on point, *Johnson v. Home State Bank, supra,* deals with the dischargeability of a mortgage lien in a Chapter 13 case. In *Johnson v. Home State Bank,* this Court determined that a mortgage creates two liabilities: *in personam* liability of the debtor and *in rem* liability against the land. *Johnson v. Home State Bank,* 111 S.Ct. at 2154. Citing 11 U.S.C. §524(a)(1), this Court reaffirmed that a discharge under 11 U.S.C. §727 extinguishes the *in personam* liability of the debtor, but

does not discharge the creditors' *in rem* rights.[7] *Id.* at 2154.

The Fourth Circuit's decision is in conflict with the above decisions in *Johnson v. Home State Bank* and *Gregory v. Peoples* for the reason that it holds that personal liability is not discharged simply because the obligation arises from a covenant that runs with the land. Covenants that run with the land are not "unique" in bankruptcy law, and are not included in the debts that are exempted from discharge.[8] Personal liability arising from a covenant that runs with the land can be severed from the *in rem* liability, and the personal liability can be discharged. The common law exception to discharge that the Fourth Circuit has created in respect to covenants that run with the land should be overturned.

III.

THIS CASE INVOLVES THE RIGHT OF ALL OWNERS OF REAL PROPERTY TO HAVE THEIR PERSONAL LIABILITY FOR POST-PETITION HOMEOWNER'S ASSOCIATION DUES DISCHARGED, AND THEREBY FULLY ENJOY THE "FRESH START" CONTEMPLATED BY THE BANKRUPTCY CODE.

The issue which Rosenfeld brings before this Court involves interpretation of the statutory language of the Bankruptcy Code and Congress' intent in drafting the

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[7] Although creditors are enjoined from attempting to collect discharged debts from the debtor, the creditors are not enjoined from enforcing *in rem* remedies. Personal liability of a debtor has been discharged under 11 U.S.C. §524(a)(2), but the *in rem* remedies survive the discharge. (78a).

[8] The specific statutory exceptions to discharge are set forth in 11 U.S.C. §523 (Collier 1990). (72a-77a). Post-petition cooperative assessments are not listed within 11 U.S.C. §523. The Fourth Circuit's ruling creates a common law exception to discharge.

language. The equitable principles of the "fresh start" sought by Congress through the Bankruptcy Code hangs in the balance on the outcome of this case.

The impact of the resolution of these issues will be widespread. The impact of this case is not limited to Rosenfeld, but may involve the majority of all debtors and all homeowner's associations throughout the United States. A large number of people reside in homes subject to the controls and assessments of some type of homeowner's association, and the rights of these individuals are at stake in this case.

The growing conflict between the courts in the federal system has caused debtors and homeowner's associations to have inconsistent and conflicting rights based upon the same statutory language. Their rights are entirely dependent upon the *sole factor* of where the debtor declares bankruptcy. If a debtor files for bankruptcy in the Western District of Pennsylvania, Illinois, Ohio, California, Utah, or Minnesota, personal liability for assessments will be discharged. If a debtor resides in New York, Virginia, Colorado, or the Eastern District of Pennsylvania, the debtor cannot obtain a discharge for assessments. If a debtor files in the Middle District of Florida, that debtor cannot even predict what will happen; the Middle District of Florida has conflicting decisions.

Resolving the issue in favor of the debtors will mean that debtors will have the ability to obtain the "fresh start" intended by the Bankruptcy Code. If a debtor is unable to afford to remain in his residence after a bankruptcy (or in the case of an investor, is unable to continue to afford to manage the investment prop-

erty), and if the debtor cannot either sell the property,[9] or transfer the property to the association or secured lender[10], he should have the choice to continue to abandon the property and all appurtenant liability.[11]

A ruling against discharge will greatly hinder the ability of debtors who seek to abandon their property as part of their bankruptcy to obtain a "fresh start." Homeowner's associations will be encouraged to ignore their *in rem* rights and continue to attack a debtor who has already cried "uncle" by seeking refuge in the Bankruptcy Court, and assessments will continue to accrue against the debtor until such time as the lender decides to foreclose upon the property. In Rosenfeld's case, the lender has not foreclosed after almost four years.

Another problem with the Fourth Circuit's decision is that, even if an association or a mortgage noteholder eventually exercises *in rem* remedies, the association could still obtain a judgment against the debtor. The association would thereby enjoy a position far superior

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[9]The lien of the first Deed of Trust noteholder, which was discharged to Rosenfeld personally, exceeds the market value of the Unit.

[10]In Virginia, a borrower cannot convey property to a secured lender or association without their consent. *Skipwith v. Cunningham*, 35 Va. (8 Leigh) 271 (1837). In this case, neither Trustbank nor River Place consented to accept a deed in lieu of foreclosure.

[11]Rosenfeld does not contend that a debtor should be allowed to live in a residence and *not* pay homeowner's association dues. A homeowner's association will still be able to assess the dues against the property. If the debtor does not pay the dues, the association can pursue its *in rem* remedies, including foreclosure, eviction of the debtor, and in the instant case, rental of the Unit by River Place.

to all other creditors, and effectively prevent the "fresh start" so desperately needed and sought by the debtor. Rosenfeld, on behalf of all debtors owning property subject to a homeowner's association, asks this Court to prevent such an inequitable result.

Debtors such as Rosenfeld who were the victims of the economic downturn of the late 1980s and early 1990s should not be penalized because their lender, cooperative association, condominium association, or homeowner's association did not diligently pursue their remedies. The debtor, by filing for relief in the Bankruptcy Court, has taken all the action he can possibly take; and the association must be forced to take some action to mitigate its damages.[12]

If not reviewed by this Court, the Fourth Circuit's decision will prevail, the conflict among the various circuits will continue, and debtors will be deprived of their ability to obtain a "fresh start".

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[12]In the case of Rosenfeld, as with many others, the lender was taken over by the Resolution Trust Company, and his property currently sits in an administrative morass. Almost four years have passed since Rosenfeld filed for Chapter 7 protection, and the first Deed of Trust noteholder still has not foreclosed upon the Unit. Rosenfeld has been denied use and possession of the Unit, and the Unit remains vacant to date. The Association, during this period of time, has not foreclosed on the Unit to enforce their lien, nor has the Unit been rented.

CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

Respectfully submitted,

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July 27, 1994

Supreme Court, U.S.
FILED

94 170 JUL 27 1994

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY ROSENFELD,

Petitioner,

v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

[Filed SEP 25 1992]

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case. No. 90-12716-AT

(Chapter 7)

IN RE: JEFFREY ROSENFELD

Debtor.

ORDER

For the reasons stated by the court in its memorandum opinion entered simultaneously it is ORDERED that the debt owed to River Place East Housing Corporation ("River Place") for cooperative assessments has been discharged under 11 U.S.C. § 727.

It is further ORDERED that River Place has violated the permanent injunction set out in 11 U.S.C. § 524(a)(2) and shall cease and desist all collection activities for cooperative assessments against the debtor.

It is further ORDERED that the debtor's motion for sanctions is DENIED.

Signed this 23rd day of September 1992.

/s/ Douglas O. Tice, Jr.
DOUGLAS O. TICE, JR.
UNITED STATES BANKRUPTCY JUDGE

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NOTICE OF JUDGMENT OR ORDER
Entered On Docket 9/25/92

APPENDIX B

[Filed SEP 25 '92]

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case. No. 90-12716-AT

(Chapter 7)

IN RE: JEFFREY ROSENFELD

Debtor.

MEMORANDUM OPINION

This case comes before the court on the debtor's Motion for Contempt against the Board of Director of River Place East Housing Corporation (hereinafter "River Place"). The debtor alleges River Place has violated the permanent injunction set out in 11 U.S.C. §524(a)(2) by filing suit against the debtor to collect past due cooperative assessments. The debtor claims that any amount owed for cooperative assessments was discharged in his chapter 7 bankruptcy case. For the reasons set forth in this memorandum opinion the court agrees with the debtor and will order River Place to cease and desist all collection activities for cooperative assessments. However, the court denies the debtor's motion for sanctions.

Findings of Fact

Mr. Rosenfeld, the debtor, acquired a cooperative interest in River Place on January 12, 1983. TrustBank

Savings, F.S.B. holds a first deed of trust on the debtor's cooperative interest. His interest is comprised of 1590 shares of stock in River Place East Housing Corporation, coupled with a possessory interest in Unit E- #902 under a Proprietary Lease that was assigned to him by the prior owner. A Declaration of Covenants, Easements and Liens governs the cooperative and the obligation of owners to pay monthly assessments for units in the cooperative.[1] As his financial situation deteriorated Mr. Rosenfeld failed to pay his required monthly cooperative assessments. Thereafter River Place suspended his right to use the common areas of the cooperative, and his rights have never been reinstated.

On October 22, 1990, the debtor filed a chapter 7 bankruptcy case. River Place was named, scheduled, and properly noticed as a creditor in the bankruptcy. River Place filed a Notice of Entry of Appearance of Counsel on February 7, 1991. On February 13, 1991, the debtor was granted a discharge under 11 U.S.C. §727.

Prior to his discharge, the debtor signed a consent order granting the first trust holder, TrustBank Savings, F.S.B., relief from the automatic stay to foreclose upon the debtor's cooperative interest. TrustBank has not yet foreclosed.

On March 3, 1991, River Place filed suit in state court against the debtor pursuant to Virginia Code §55-472 to collect post-petition cooperative assess-

---

[1]The purpose of the assessments are for (i) upkeep of the recreational facilities within the common area, (ii) upkeep of roads, curbs, and gutters in the common area, (iii) upkeep of parking facilities, and (iv) all other common expenses. *See* Debtor's exhibit B, p. 13.

ments.[2] River Place decided to collect past assessments from the debtor personally as opposed to exercising their statutory right to foreclose upon the unit.

---

[2](Section 55-472 states in relevant part:

> §55-472. Remedies for nonpayment of assessments. — A. The association has a lien on a cooperative interest for any assessment levied against that cooperative interest or fines imposed against its owner from the time the assessment or fines become due. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged . . . are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due. Upon nonpayment of the assessment, the proprietary lessee may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section. The association's lien may be foreclosed: (i) by judicial sale in like manner as a mortgage on real estate; or (ii) by power of sale as provided in subsection I. . . .

Va. Code Ann. §55-472(A) (Michie 1986). Subsection I sets forth notice and sale procedures if the association chooses to conduct the sale. Subsection J states that the proceeds of a sale shall be applied in the following order:

> 1. The reasonable expenses of sale;
> 2. The reasonable expenses of securing possession before sale; holding, maintaining and preparing the cooperative interest for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and to the extent provided for by agreement between the association and the proprietary lessee, reasonable attorney's fees and other legal expenses incurred by the association;
> 3. Satisfaction in the order of priority of any prior claims of record;
> 4. *Satisfaction of the association's lien*;
> 5. Satisfaction in the order of priority of any subordinate claim of record;
> 6. Remittance of any excess to the proprietary lessee.

Va. Code Ann. §55-472(J) (Michie 1986) (emphasis added).

The debtor is not in possession of the unit and has not occupied or possessed the unit at any time relevant to this case. In fact, the evidence conclusively establishes that the debtor wants to be rid of this albatross but can find no one willing to foreclose or take the title.

The debtor argues his bankruptcy discharge relieved him of any personal liability for pre- or post-petition cooperative assessments. He further argues that River Place's attempt to collect this debt from him personally is in contempt of this court and sanctionable.

River Place argues that only pre-petition assessments were discharged in the debtor's bankruptcy and that the debtor remains liable, as title holder, for all post-petition assessments. To support this proposition River Place argues that the obligation to pay monthly assessments arises anew every month. That is, by definition post-petition cooperative assessments cannot be discharged in bankruptcy. River Place further argues that the obligation to pay cooperative assessments is not contractual but rather a covenant running with land falling squarely on the title holder.

Discussion and Conclusions of Law

Ths issue before the court is whether the debtor's previous discharge relieved him of personally liability for cooperative assessments imposed post-petition. Conflicting case law addressing this issue is legion.[3] However,

---

[3]Some courts have ruled for the debtor(s). *In re Rosteck*, 899 F.2d 694, 696 (7th Cir. 1990); *In re Elias*, 98 B.R. 332, 334-35 (N.D.Ill. 1989); *In re Hodge*, Case No. 90-10275-AT (E.D.Va. July 20, 1992); *Matter of Wasp*, 137 B.R. 71, 73-73 (Bankr. M.D.Fla. 1992); *In re Miller*, 125 B.R. 441, 443 (Bankr. W.D.Pa. 1991); *In re Cohen*, 122 B.R. 755, 757-58 (Bankr. S.D.Cal. 1991);

[footnote continued]

the court finds the cases holding in favor of discharge more compelling.

The court believes the proper analytical framework for determining whether these post-petition assessments were discharged is: (1) was the obligation a "debt" for purposes of the Bankruptcy Code; and if so, it was discharged unless (2) it is subject to any exception. *In re Elias,* 98 B.R. 332, 336 n.2.

Federal law, not state law, governs when a debt or claim arises for purposes of determining dischargeability. *In re Rosteck,* 899 F.2d 694, 696 (7th Cir. 1990); *In re Cohen,* 122 B.R. 755, 757 (Bankr. S.D. Cal. 1991); *In re Turner,* 101 B.R. 751, 754 (Bankr. DUtah 1989); *see also In re Kuranda,* 122 B.R. 264, 267 (Bankr. E.D.Va. 1990). Accordingly, the court must look to how the Bankruptcy Code defines "debt" and "claim." *See e.g., Rosteck* 899 F.2d at 696.

In re Turner, 101 Bankr. 751, 754-55 (Bankr. D.Utah 1989); *In re Montoya,* 95 B.R. 511, 513-14 (Bankr. S.D.Ohio 1988); *In re Behrens,* 87 B.R. 971, 974-75 (Bankr. N.D.Ill. 1988). *See also In re Ryan,* 100 B.R. 411, 415-16 (Bankr. N.D.Ill. 1989). *Cf. In re Val Moritz Invest. Group, Ltd.,* 116 B.R. 257, 258 (Bankr D.Colo. 1990).

Other courts have rule for the homeowner's/condominium association. *In re Raymond,* 129 B.R. 354, 359-61 (Bankr. S.D.N.Y. 1991); *In re Hill,* 100 B.R. 907, 909 (Bankr. N.D.Ohio 1989); *In re Wetherbee,* 1989 WL 110796, *1-4 (Bankr. D.Colo. Mar. 13, 1989); *In re Harvey,* 88 B.R. 860, 862 (Bankr. N.D.Ill. 1988); *In re Case,* 91 B.R. 102, 103004 (Bankr. D.Colo. 1988); *In re Rink,* 87 B.R. 653-654 (Bankr. D.Colo. 1987); *In re Horton,* 87 B.R. 640, 652 (Bankr. D. Colo. 1987); *In re Strelsky,* 46 B.R. 178, 180-81 (Bankr. E.D.Va. 1985). *See also In re O'Mara,* 141 B.R. 237, 238-39 (Bankr. M.D.Fla. 1992); *In re McNeil,* 128 B.R. 603, 613 (Bankr. E.D.Pa. 1991); *In re Lenz,* 90 B.R. 458, 460 (Bankr. D.Colo. 1988); *In re Stern,* 44 B.R. 15, 20 (Bankr. D. Mass. 1984).

Under the Bankrtupcy Code " 'debt' means liability on a claim." 11 U.S.C. §101(12).[4] Claim is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent,* matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . ." 11 U.S.C. §101(5)(A) (emphasis added). The plain language of the Code clearly supports a broad approach when interpreting "claim." *Ohio v. Kovacs,* 469 U.S. 274, 279 (1985). The legislative history reinforces the impression of a broadly inclusive legislative intent:

> By this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or *contingent,* will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

S. Rep. No. 989, 95th Cong., 2nd Sess. 21-22 (1978) (emphasis added).

Given this broad language, River Place's claim for post-petition assessments must be considered a "contingent" pre-petition claim arising when the debtor contracted to purchase an interest in the cooperative. Contingent means "possible, but not assured; doubtful or uncertain; conditioned upon the occurrence of some future event which is itself uncertain, or questionable." Black's Law Dictionary 290 (5th ed. 1979). River Place's right to payment for post-petition assessments existed pre-petition and was "contingent" upon the

[4] Liability "is a broad legal term. . . . It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, *contingent,* or likely. . . ." Black's Law Dictionary 823 (5th ed. 1979) (emphasis added).

debtor retaining post-petition title to the cooperative interest. *In re Ryan,* 100 B.R. 411, 415 (Bankr. N.D. Ill. 1989). It is well settled that where an obligation to pay a debt arises pre-petition, but the debt becomes due post-petition, that debt is pre-petition for purposes of the Bankruptcy Code. *See In re A. H. Robins Company, Inc.,* 63 B.R. 986 (Bankr. E.D.Va. 1986), *aff'd* 839 F.2d 198 (4th Cir. 1988).

This court believes that post-petition assessments, arising from a pre-petition cooperative agreement, constitute pre-petition debt. It would be contrary to the intent of Congress and "at loggerheads with the statute's wording" to read the definition of " 'debt' in so crabbed a manner" as to exclude River Place's claim for post-petition assessments. *In re Elias,* 98 B.R. at 335-36. Moreover, this court's conclusion is consistent with the well-settled bankruptcy policy of allowing honest individual debtors to start afresh free from the pressure and discouragement of pre-existing debt. *See e.g., Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934) (citing *Williams v. U.S. Fidelity & G. Co.,* 236 U.S. 549, 554-55 (1915)).

Accordingly, River Place's claim was extinguished by the debtor's chapter 7 discharge since no applicable exception exists under §727 or §523 of the Bankruptcy Code.

River Place cites *In re Strelsky,* 46 B.R. 178 (Bankr. E.D.Va. 1985), the only other opinion in this district addressing this issue, for the proposition that post-petition condominium/cooperative assessments are excepted from discharge. In *Strelsky,* Chief Judge Bostettler let stand a state court ruling against the debtor for condominium fees. Chief Judge Bostetter, while referring

to the equities in another similar case, stated in dicta "that because the debtors continued to receive the benefits of living in the condominium, the debtors should be liable for the condominium fees." *Id.* at 180. This reasoning has been criticized for seeming to create a common law exception to the discharge provisions of §727(b) and for not being grounded in a particular legal principle.

As stated previously this court's decision turns on when the debt to River Place arose, not on whether the debtor vacated the premises or received any benefits of ownership post-petition. *Matter of Wasp,* 137 B.R. 73 (Bankr. M.D. Fla. 1992). The court in *In re Ryan* addressed River Place's argument to the contrary:

> The rationale that a condominium owner-debtor has retained postpetition title to the property begs the question. In this case, the Debtors have retained title because . . . [the condominium association] chose not to foreclose on its lien. It not only has a postpetition lien on the Debtor's property for unpaid assessments, but it also seeks to hold the Debtors personally liable for said debt. The Code, however, does not support such a result. . . . [The condominium association's] only remedy for post-petition assessments is to foreclose on its lien, thereby divesting the Debtors of title and halting the accrual of such debt. Otherwise, unless and until the Debtors were able to dispossess themselves of title, they would remain liable for these assessments . . . even where the debtor offers to surrender the property to the association, but the association refuses. . . . [This rationale] allows, indeed encourages, condominium associations not to foreclose on their lien but instead allow postpetition assessments to accrue. . . . In essence, under . . .

> [this rationale], a condominium association holds the debtor hostage because it may elect not to foreclose on its lien and divest the debtor of title on the one hand, and, on the other, the debtor cannot abandon fee simple title and walk away from post-petition assessment obligations. . . . This goes against the very essence of the Code's "fresh start" policy.

In re Ryan, 100 B.R. 411, 416 (Bankr. N.D.Ill. 1989). *Accord In re Behrens,* 87 B.R. 971, 975 (Bankr. N.D.Ill. 1988).

As suggested by the foregoing passage, River Place is not without a remedy. *See also supra* note 2. The debtor retains title only until River Place forecloses. *Behrens,* 87 B.R. at 975. It may be that foreclosure is an unattractive remedy for River Place if in this case prior encumbrances exceed the value of the cooperative interest. This concern, however, does not change the court's opinion that the debtor's personal obligation to pay the cooperative assessments has been discharged. *In re Turner,* 101 B.R. 751, 754 (Bankr. D.Utah 1989).

River Place contends that allowing debtors in bankruptcy to escape their obligations for post-petition cooperative assessments allows debtors to reside in their units as long as they wish, unencumbered by the obligation to pay assessments that their fellow cooperative owners must pay. Such a ruling, according to River Place, will impair ability of all forms of community associations to function. Record at 29. While this problem is arguably troubling, the broad language Congress used in the Bankruptcy Code compels this result. The court has no power to change that language to reach a more "palatable" result. *In re Rosteck,* 899 F.2d 694, 697 (7th Cir. 1990). Contingent debts are still debts, and Congress has not exempted the type of debt in this case from discharge.

Rosteck 899 F.2d at 697 (citing *In re Elias,* 98 B.R. 332, 336 (N.D. Ill. 1989)).

The court finds that River Place violated the discharge injunction of 11 U.S.C. §524. Therefore, River Place shall be ordered to discontinue their efforts to collect assessments from the debtor. *In re Turner,* 101 B.R. 751, 755 (Bankr. D.Utah 1989).

Since legal authority exists supporting the position of each party the court does not believe that River Place's violation has been willful or deliberate and therefore will not award sanctions. *In re Miller,* 125 B.R. 441, 443 (Bankr. W.D.Pa. 1991)

A separate order will be entered.

Signed this 23rd day of September, 1992

/s/ Douglas O. Tice, Jr.
DOUGLAS O. TICE, JR.
UNITED STATES BANKRUPTCY JUDGE

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NOTICE OF JUDGEMENT OR ORDER
Entered On Docket 9/25/92

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BANKRUPTCY NO. 90-12716-AT

CIVIL ACTION NO. 93-58-A

In re:

JEFFREY ROSENFELD,

Debtor.

BOARD OF DIRECTORS OF
RIVER PLACE EAST HOUSING CORPORATION,

Appellant/Counter-Appellee,

v.

JEFFREY ROSENFELD,

Appellee/Counter-Appellant.

ORDER

For the reasons stated from the bench, the court concludes that the Appellee, Jeffrey Rosenfeld, is still the record owner of the cooperative interest in River Place East Housing Corporation, a residential housing co-op; that the co-op fees which accrued post-petition were not discharged by the bankruptcy; that the interest of Rosenfeld has not been abandoned nor has the interest

of Rosenfeld in the co-op ever been treated in the bankruptcy proceeding as a leasehold interest; and that the filing by River Place East against Rosenfeld to collect post-petition fees was not a violation of the permanent injunction of 11 U.S.C. §524(a). Accordingly, it is hereby

ORDERED that the judgment of the United States Bankruptcy Court of September 25, 1992, finding River Place East in contempt is reversed.

And it further appearing that the question of the prevailing party in the state court proceeding, a question that is central to an award of attorney's fees has not been resolved, and the court being unwilling to impose sanctions for the citation of Judge Bostetter's ruling or for the attachment to the brief by River Place East of the co-op's by-laws, it is further

ORDERED that:

1. The cross appeal of Rosenfeld is denied.

2. The motion by Rosenfeld for sanctions is denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 16th, 1993

APPENDIX D

[1]

IN UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

C.A. NO. 93-58-A

RIVER PLACE EAST HOUSING CORPORATION,
Plaintiff,

Versus

JEFFREY ROSENFELD,
Defendant.

Alexandria, Virginia
Friday, April 16, 1993

The above-entitled matter came on to be heard before the Honorable Albert V. Bryan, Jr., a Judge in and for the United States District Court, Eastern District of Virginia, in Courtroom 1, United States District Courthouse, 200 South Washington Street, Alexandria, Virginia 22320-2449, beginning at 10:15 o'clock a.m., before B. Charles Hopchas, a Verbatim Court Reporter, when there were present on behalf of the respective parties:

[2]
APPEARANCES:

On behalf of the Complainant:
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Palmieri and Palmieri, PC
8027 Leesburg Pike
Suite 207
Vienna, Virginia 22182

On behalf of the Defendant:
ROBERT B. BAUMGARTNER, ESQUIRE
10482 Armstrong Street
Fairfax, Virginia 22030

[3] PROCEEDINGS

THE CLERK: Civil action number 93-58-A, River Place East Housing Corporation versus Jeffrey Rosenfeld.

MR. BAUMGARTNER: Your Honor, opposing counsel is not present yet. I don't know how the Court wants to handle that.

THE COURT: Well, it's not quite ten o'clock. At ten o'clock whether they're present or not we'll go ahead. In the meantime maybe we can take up a case where the counsel is present.

(Docket is resumed.)

THE CLERK: Civil action number 93-58-A, River Place East Housing Corporation versus Jeffrey Rosenfeld.

THE COURT: This comes on on the – well, actually they are cross appeals, but it is mainly the Board of Directors of River Place's appeal on the holding of contempt by the bankruptcy –

MR. BAUMGARTNER: Yes, Your Honor. Your Honor, Robert Baumgartner on behalf of Jeffrey Rosen-

feld. There also is a motion for sanctions, I don't [4] know in what order you want to hear –

THE COURT: Well, I think the – why don't we hear the – River Place's appeal first. Depending on the outcome of that then we can resolve the sanctions.

MS. PALMIERI: Your Honor, Denise Palmieri, counsel for River Place East. And Your Honor, I'm embarrassed to say that when I contacted the Clerk I asked whether this was with respect to the motion for sanctions or for the appeal. And I was informed that this was solely for the purpose of the motion for sanctions.

And I'm embarrassed to say that while I am familiar with the case and I am prepared to argue it, I came here this morning solely prepared to argue the motion for sanctions, which was what the Clerk instructed me was the sole purpose this morning.

THE COURT: Well, the sanction that the bankruptcy court – didn't the bankruptcy court impose a sanction for contempt?

MS. PALMIERI: They imposed the order of contempt but there was no sanction imposed. Mr. Baumgartner filed a motion for sanctions with respect to [5] the filing of briefs, and that was my understanding of what this hearing was –

THE COURT: Well, I thought we were here today to hear the appeal. And I don't want to catch you on – but I don't see any point in coming here twice.

MS. PALMIERI: No, I agree, Your Honor, and –

THE COURT: When is the appeal set?

MS. PALMIERI: Well, Your Honor, that's why I called the Clerk's office to find out. And when I spoke with them – I have the name of the Clerk who I spoke with –

THE COURT: Didn't you get – you get a briefly schedule, did you, on the appeal?

MS. PALMIERI: I did get a briefly schedule, on the briefing schedule that it was – I mean there was no date scheduled for oral argument on it, Your Honor. I received a notice that said the appeal, and I called the Clerk's office to ascertain whether it was solely for the motion for sanctions or for the appeal. And I was instructed the motion –

THE COURT: Well, I guess we'll hear the motion for sanctions. I'm going to hear the appeal [6] then on the papers, I'm not going to have oral argument twice on this.

MS. PALMIERI: I understand, Your Honor.

MR. BAUMGARTNER: Your Honor, we'll note that there were two notes that were sent out. One note was on my motion for sanctions and the second notice the Court had sent out setting down, I believe, the appeal for today. Our office also called because it did not – the second notice did not specify specifically what was on the record.

We were confused; we called the Court; and although Ms. Palmieri has always been truthful with me, I have no reason to disagree with what she said.

We were advised by the Clerk that both matters were on the record for argument today.

THE COURT: Well, certainly we thought they were, and – well, I'll hear in in support of your appeal, and I'm not going to hear any further argument on it, but you can address both your appeal and the River Place East appeal.

I have real problems with this post-petition matter. And let me tell you why.

[7] When your client went into bankruptcy he did not list this interest in this co-op as an asset. And stated that it was being foreclosed. But it wasn't foreclosed, was it?

MR. BAUMGARTNER: No, Your Honor. It's still –

THE COURT: Well, did he ever file an amended petition to say that it hadn't been foreclosed?

MR. BAUMGARTNER: Your Honor, I do not recall an amended petition. However, within the bankruptcy itself I will note that River Place had filed a notice of appearance to receive notice of everything that was happening in the bankruptcy. They knew what was happening in the bankruptcy. And Trust Bank filed it's motion for relief from stay and requested relief, thereby indicating to whoever was a party to the bankruptcy –

THE COURT: Well, they got relief from stay but they never foreclosed, did they?

MR. BAUMGARTNER: That is correct, Your Honor. To this date they have not.

THE COURT: So whatever interest is in that – what has happened to the interest that's in that co-op?

[8]MR. BAUMGARTNER: Your Honor, it depends upon one of two theories. If the Court agrees with us and agrees with River Place North which is a sister association to River Place East that this was a lease interest that Mr. Rosenfeld had –

THE COURT: He didn't list it as a lease interest. This lease interest thing is a little – sort of late comer, isn't it?

MR. BAUMGARTNER: Your Honor, I –

THE COURT: He didn't list it on his application. He didn't –

MR. BAUMGARTNER: It was not listed on the application. However, I believe that that question of whether it was listed or not does not affect whether or not the least itself is rejected within the bankruptcy within the sixty days. And it not having been assumed within the sixty days I think the Code is mandatory language that regardless of whether it was listed or not, if there is

notice about the interest – and the River Place interest was, there was notice that he had an interest in River Place – that at that point it is rejected after the sixty days. It's a –

THE COURT: Well, he didn't list any[9] interest that he had, did he, in his petition? All he said was it's being foreclosed, or it has been foreclosed as a matter of fact is the way he put it. Which was incorrect. It hadn't been foreclosed and never has been foreclosed, has it?

MR. BAUMGARTNER: That is correct, Your Honor. And I believe that that was corrected within the proceedings within the bankruptcy court in that Trust Bank itself did file for its relief from stay, and having done that then I think it became part of the record that in fact it had not been foreclosed; any creditor that had requested notice of anything that was occurring in the bankruptcy would have received notice of that; River Place had in fact filed its notice of appearance.

They were a party to this, too, and so whatever happened, if there was an error through the schedule I believe it was corrected as the result of what happened in the foreclosure. Or within the actions taken by the Trust Bank to get relief from stay to be able to foreclose.

But I suggest to the Court there might be a second way to look at this, and that's the question of what – it's not so much how the interest was [10] initially scheduled on the schedules, but rather whether or not the debt itself was a debt that will fall within the meaning of the bankruptcy court.

Mr. Rosenfeld did list the debt owing to River Place East, and did indicate that there was association dues that were due pre-petition. He placed the dues –

THE COURT: Did he list as a potential liability or contingent liability future obligations?

MR. BAUMGARTNER: It was not specifically listed, Your Honor, and –

THE COURT: Well, it wasn't unspecifically listed either, was it?

MR. BAUMGARTNER: I think it is listed within the concept of the bankruptcy code that again, once there is notice of any sort of a claim within the bankruptcy code, I think that both the congressional intent and the wording of the bankruptcy code take into consideration that at that point the Court has jurisdiction over everything that is the debtor's that's going to allude to at all.

And at that point, once those dues were referred to and once it was known within the bankruptcy [11] court from the pleadings that there still was interest that he had within River Place, I think the code takes precedent over this.

I understand the Court's troubled by that, and I can understand. The prior counsel did not list that particular thing as precisely a formal claim, but I think –

THE COURT: Didn't list it at all, precisely or otherwise.

MR. BAUMGARTNER: He did refer to the fact that Rosenfeld had an interest in River Place East, and that –

THE COURT: But he said it had been foreclosed.

MR. BAUMGARTNER: Correct, Your Honor.

THE COURT: But that wasn't so.

MR. BAUMGARTNER: That is also correct, Your Honor.

THE COURT: And he never filed a petition to correct that.

MR. BAUMGARTNER: He did consent to the relief from stay, Your Honor. And I think that in doing so

that that would have cured any error that would have [12] occurred. I think that everybody at that point felt Trust Bank also was going to go ahead and foreclose. And the Trust Bank obligation was listed, which arose as the result of his security interest in the property.

I think at that point everybody assumed the foreclosure would go forward and this would not become an issue. Unfortunately, Trust Bank never did foreclose and subsequently it was taken over by the RPC and we don't know what's going to happen to it.

But I think that the bankruptcy code is not – it's sort of –

THE COURT: Well, all, though, that is really before the Court, before this Court, is whether by proceeding in the state court to collect this, the River Place East is in contempt because of the post-petition – these fees were not – were discharged.

If they're not in contempt and they are still – and are allowed to proceed with that, there are still defenses that you can raise to that. I mean a resolution of this appeal adversely to you doesn't mean that automatically that River Place East gets a recovery in the state court, does it?

MR. BAUMGARTNER: It does not, Your [13] Honor, and I would suggest that there are several things that could happen.

One is that if this appeal were adversely decided against us that we would go right back into the bankruptcy court and request the right to reopen the case, amend the schedules and proceed right back to where we are at this point, saying it was discharged.

The case law – we have cited some case law on different points within our brief. The case law is pretty clear

that if it's not a prejudice to the creditors that the court, the bankruptcy court, has almost unlimited discretion to be able to correct matters that have occurred or errors that have occurred within the pleadings, so we would go back into court, we'd ask for the amendment.

I have great confidence that because there's no prejudice to River Place as a result of this that we would be able to get the amendment and then we would be right back here again.

THE COURT: All right. Now, your appeal of the sanctions – I've jumped ahead of you on that – anyway, you want to address that.

MR. BAUMGARTNER: There are two issues, [14] Your Honor, two sanction issues that are before the Court right now. One is a question of whether or not as the prevailing party within the motion for contempt we're entitled to attorney's fees under the – Virginia Code 55-472, I believe –

THE COURT: Well, in your state court proceeding did you purport to be – or did they purport to be bringing that action under that section?

MR. BAUMGARTNER: Under the warrant in debt they listed that they were bringing it under the covenants. Our contention, Your Honor, is that those covenants exist only because of the Virginia Real Estate Cooperative Act. You can't have a cooperative, you can't have a declaration or whatever without first there having been enabling legislation which was the Real Estate Cooperative Act.

That act specifically provides that it cannot be amended or waived or whatever by any agreement. It's binding upon that cooperative. That's one affect, it's the umbrella under which the entire cooperative and

declarations are created. And as such anything that the code provides is binding on anything that occurs in respect to the cooperative subsequent to the passing of [15] that enabling legislation.

So although the technical reading of the warrant in debt is that it was brought under the covenant, it's our contention that the statute applies, and that statute is a mandatory statute that the attorney's fees will be awarded, reasonable attorney's fees, will be awarded to the prevailing party.

So the statute controls both levels.

THE COURT: And the second arm of your sanction appeal?

MR. BAUMGARTNER: Well, the second thing we have for sanctions is our motion for sanctions that was filed as a result of the briefs that were filed in this case.

If I can go back to the appeal, we aren't – we do not feel that it's a question of whether attorney's fees within the appeal should be awarded on the basis of sanctions. What we're saying is that because we were the prevailing party at the bankruptcy court that at that point the Virginia Code mandatory language kicks in. That's not a sanction like a rule, those attorney's fees.

THE COURT: So your position is that [16] you were the prevailing party in the bankruptcy –

MR. BAUMGARTNER: Correct.

THE COURT: – or is it because you're the prevailing party in the state court's decision?

MR. BAUMGARTNER: Your Honor, we believe whether it's analyzed under the concept of pendente jurisdiction or it's looked at as it being all one action, that because the state action had been filed and it necessitated that we file in the bankruptcy court – the bankruptcy court is the place we have to go to stop that state

court action – that again, whether it's under pendente jurisdiction of the Federal Court or under looking at it as just one large case, that we're still the prevailing party. They cannot proceed with the state court action, and therefore that is stayed at this point.

THE COURT: But it hasn't been resolved, has it, I mean to the extent that – has anything more happened to it than it has been stayed?

MR. BAUMGARTNER: Not –

THE COURT: Well, part of your argument on this is that you're entitled to attorney's fees as prevailing party in the state court proceeding.

[17]MR. BAUMGARTNER: Yes, Your Honor.

THE COURT: Whether you say that state court proceeding is now incorporated in the bankruptcy or not –

MR. BAUMGARTNER: Yes. There has not been a subsequent procedural step that has been taken in the state court action. What I would contemplate is that once there has been a final determination, once we have a final non-appealable order through this process, that at that point then there would be a subsequent order entered in the state court dealing with either dismissal if the appeal is decided in our favor or with allowing the case to go forward in the state court.

So procedurally we aren't at the point of having the final resolution there, that that final resolution will be entirely dependent upon the resolution for this.

The second sanctions, Your Honor, was the motion that we filed subsequent to receiving the brief by River Place, and just to address two things that we found – we were concerned about.

One was a citing of a case. There was – Judge Bostetter did rule in a case of In Re [18] Justice, had a bench ruling of In Re Justice, in which he – Judge

Tice and Judge Bostetter are on opposite ends of this question on the dues, and Judge Bostetter did make an oral ruling from the bench, and there was a transcript that was typed from – concerning that.

There was no written order and to this date I'm not aware of one unless one has been entered in the last couple of weeks, I'm not aware of any ruling, actual written order that was issued by Judge Bostetter. However in the transcript he indicated that he would be issuing an order, but it has not been forthcoming.

He did reserve in the transcript – and the transcript is attached to our motion for sanctions – the right to – he was reserving the right to issue a written order to make other findings, and it may very well be that he is waiting on this case to decide what the final ruling could be.

I also know talking to counsel for that case that it was his intent that once that order was entered he was also appealing that order. So we've been troubled by the fact that there was cited as precedent in this court a final – or an order by Judge Bostetter that in fact never did exist.

[19]The second thing we're troubled by was the attachment of the bylaws to the brief as part of the appendix, in that the bylaws – we had a full hearing, and we had an opportunity – both sides had an opportunity to supplement the record fully. And the bylaws were never part of the record.

And now River Place has come forward and is relying fairly heavily upon the bylaws, both in their initial brief and in their reply brief to us. They cite a passage out of the bylaws, and those bylaws were never a part of the record, Your Honor. And the rules are pretty clear about what the procedures are for establishing the record, that the bylaws had never been entered into evidence or

being part of the record, we are again bothered that they would just put that into the record and let it sit there as if it was a part of the record.

And we're asking that the Court determine what the appropriate penalty would be for that. We have listed four possibilities that range anywhere from striking the reference to the case and striking the reference to the bylaws to dismissing the brief and dismissing the appeal and awarding attorney's fees.

[20]We would just ask in the discretion of the Court in a situation like this that it be up to the Court to decide what would be appropriate.

THE COURT: All right.

MS. PALMIERI: Your Honor, with respect to Mr. Baumgartner's motion for sanctions, we have laid out our position fully in the pleadings that were filed in this matter, but to address two specific issues – Mr. Baumgartner has raised two particular points in his motion for sanctions against both River Place and against myself individually in this matter.

Mr. Baumgartner seems troubled by the fact that we made reference to Judge Bostetter's oral ruling from the bench in In Re Justice. The citation to In Re Justice was for a particular reason. Mr. Baumgartner and Mr. Rosenfeld have asserted that – and as well as Judge Tice – in interpreting Judge Bostetter's previous ruling in In Re Strausky that Judge Bostetter relied upon the debtor's occupancy of the property.

Judge Bostetter in his most recent ruling of In Re Justice dispels that notion that his previous ruling in In Re Strausky had any relationship at [21]all to the occupancy. It was cited for that sole purpose, and we did reference that it was coming from the transcript.

Mr. Baumgartner seems troubled by the fact that we cited In Re Justice. However, in the brief that he filed

on the same day he filed his motion for sanctions he also references In Re Justice in support of his position contrasting to this present case.

Additionally, with respect to the inclusion of the bylaws, it's River Place's position that the appeal is to be considered on a de novo review, and therefore the inclusion of the bylaws was appropriate. Moreover, we would note for the Court that Mr. Baumgartner additionally in the appendix to Mr. Rosenfeld's brief included an additional document.

It's our position that the motion for sanctions is nothing more than a sledgehammer to beat River Place and our firm individually. We've been subjected to motions for sanctions at every stage of this case by Mr. Baumgartner and Mr. Rosenfeld, and we think that this is another instance of impropriety given that we are forced to justify things that were not improper and that were perpetuated by Mr. Baumgartner and Mr. [22] Rosenfeld in this instance.

Sanctions would be appropriate in an instance where an attorney was promulgating chicanery on the Court, and there's no such an instance in this.

THE COURT: Do you want to address the appeal on its merits, your own appeal?

MS. PALMIERI: Yes, Your Honor, if I may, and I appreciate your accommodations in this.

It's River Place's position that it was not the Court – the congress's intent in drafting the bankruptcy code to dismiss all future obligations of any type of a bankrupt debtor. And we've laid that fairly clearly within our brief, or at least in our opinion it's been fairly clear.

To adopt the position that Mr. Rosenfeld asserts would allow him to retain title to the property and to use it if he wish. Until the foreclosure occurs he has a right to

redemption, and until River Place or until Trust Bank forecloses Mr. Rosenfeld could at any time retain without having to pay his assessments.

Mr. Rosenfeld has the power now to dispose of the property if he chose to and he has been aware that Trust Bank has not foreclosed during this [23] entire duration.

We don't believe that the intent of the drafter's of the code nor the language of the code itself is so broad as to release all future obligations of a bankrupt debtor simply by the filing of a petition.

THE COURT: All right.

MS. PALMIERI: Thank you.

THE COURT: Mr. Baumgartner, what is your client's position on what if any interest he owns in this property. Does he say he owns no interest in it, in this co-op?

MR. BAUMGARTNER: I'm sorry, I missed the last phrase.

THE COURT: Does he say that he has no interest in this co-op at this stage?

MR. BAUMGARTNER: He's saying he abandoned his interest. One of the arguments on the cross appeal is that he abandoned all interest by signing that order granting relief from stay. And the bankruptcy court – we put that in evidence in the bankruptcy court and were found that he hasn't used it, he hasn't rented it, he has done nothing with that. And it's his position that he does not have any interest in it.

[24] I would say that to the extent that he may be a record owner in the title, in the land records, that he has indicated to River Place that he is going to cooperate, do whatever is necessary to clean up anything like –

THE COURT: Well, he still is the record owner then, isn't he?

MR. BAUMGARTNER: Your Honor –

THE COURT: I mean it's never been foreclosed. And it hasn't been conveyed so far as you know?

MR. BAUMGARTNER: It has not been conveyed, although it is interesting that – well, what I'm going to say, it has not been conveyed. Under the Virginia law that says that you can get rid of your ownership interest either by recording it in the land records or by divesting yourself in open court, I believe that because he did sign that relief from stay, at that point he divested himself in open court.

There may be what I'll call a cloud on title at this point in terms of the land records themselves, but as far as under Virginia law he divested himself, he has divested himself completely by that [25] relief from stay, for signing the order for relief from stay.

So no, he takes no ownership interest in it at all.

THE COURT: All right.

MR. BAUMGARTNER: That's buttressed also by our contention that under the least theory that the lease was rejected and that because it wasn't assumed within sixty days, and then he claims no interest at all in the property or the area.

Now, in respect to the appeal by River Place, Your Honor, the – I think there are four significant facts. There are a lot of facts in this case but there are four fundamental facts I think are necessary toward the resolution of this, first that Mr. Rosenfeld acquired his interest on January 12th, 1983; at that time he became obligated under the declarations for the association, and paragraph 7.1 of those declarations states, "Each owner shall pay when due such assessment as may be made against it by the association."

That wording and his assumption at the time he acquired the interest in the property created the obligation to have to pay the dues when due.

[26] The third fact is that the association in the state court action did admit that the obligation to pay association dues arose at the time he acquired his interest in the property back in 1983 so we have a factual admission by River Place that the obligation arose at that time.

And finally that the bankruptcy occurred on October 22nd, 1990, for Mr. Rosenfeld, so that under those four facts you have the creation of the right of payment, January 12, 1983; the right of payment is clearly specified in the declaration; and then subsequently that he declares bankruptcy.

Those facts are significant in that Judge Tice relied, indeed correctly, upon a specific reading of the bankruptcy code and a specific reading of the legislative history, congressional history, on this. The code – the 4th Circuit has in the case of Grady v. A.H. Robins confirmed the holding of Judge Tice as far as the fact that the bankruptcy code and congressional intent have to be read together in determining what is a debt and what is a claim. In this case the 4th Circuit agrees, but I'll briefly review the argument that's – the concept here is that all debts of the debtor are [27] discharged unless they're specifically exempted, and under section 727.523 there are not exceptions for homeowner's association dues.

There are many other exceptions. There are student loans or governmental taxes within three years of the date of filing, for several other specific things congress decided those things should be exempted. There's no exemption for the homeowner's association dues.

So the next question is, what's a debt, if debts are discharged what is the debt, and the debt is defined –

THE COURT: Didn't this debt arise until post-petition?

MR. BAUMGARTNER: It arose pre-petition, Your Honor. It's under the code's specific wording, a right

of – a claim is defined as a right of payment. Whether or not that right to payment is mature, unmature –

THE COURT: But the couldn't have collected it pre-petition. I mean it's not like an accelerated note or anything like that.

MR. BAUMGARTNER: That is correct. I [28] think it could be looked at as exactly like a mortgage, where as long as you're current on your mortgage you – the bank has no right to be able to collect any payments that would have accrued post-petition. But you aren't discharged from the liability of the mortgage.

THE COURT: I don't know that the analogy is apt, because you know, a mortgage, if you miss a payment you can accelerate the future payments. You couldn't do that here.

MR. BAUMGARTNER: But in a mortgage if you were current on your mortgage payments when you went into bankruptcy you do not have the right to accelerate your payments. So I think that in a situation where there is no default before you go into bankruptcy on a mortgage the parallel is –

THE COURT: Of course there was a default, here.

MR. BAUMGARTNER: I would agree with that. There was default previously. In a mortgage that was not defaulted it would not be the same situation, that they can accelerate merely because of the bankruptcy being filed. In that case the personal liability is discharged and the lien continues on the property.

[29] Your Honor, I think that there was a question of is the definition of a claim to be read restrictively or expansively. And I think the 4th Circuit has answered that question.

The case that River Place relies upon, the Friendville case, comes out of the 3rd Circuit. And the Friend-

ville case did apply a restrictive reading of the – similar to your question of if you can't actually get at payment until after the petition, does the right of payment exist. And Friendville said no, the right of payment doesn't exist.

But the 4th Circuit not only doesn't agree with Friendville but specifically analyzed the Friendville case, and found that no other circuit, the 4th Circuit or any other circuit, has followed the Friendville analysis, but rather the analysis has to go back to the specific wording of the code and the congressional intent that you look at, when did the right of payment arise regardless of when you are able to actually get the money under that obligation.

And since the right of payment arose at the time in 1983 that it is not a relevant fact as far as when you can actually get at that money.

[30] It's significant – if I could urge the Court to read two cases, one would be the Grady v. A.H. Robins case we've cited and –

THE COURT: Those were cases that were dealing with the Dalkon shield litigation, and are not really applicable for this case, isn't it?

MR. BAUMGARTNER: Well, I think it is, Your Honor, because I think if you go into the Grady case there is a string cite in Grady that cites six cases, I believe, six or seven cases. And we went back into those cases and looked at them, and they're not limited to tort cases. Example being the In Re Riso case, R-i-s-o. In that case there was a question of whether a breach of a non-compete clause in an employment agreement constituted a debt or a claim, and that was a straight contract.

Similarly in the Grady case there were two causes of action. One was the tort action and the other was a

breach of warranty action. I couldn't tell specifically from the case whether the breach of warranty was limited to a contract action, but I think arguably that the Grady case itself applies to the contract action.

But the cases that Grady cited included [31] contract cases as well as tort cases. And we were unable to locate any cases where any tort setting other than the Friendville case in the 3rd Circuit. There has been a finding alone on the Friendville.

All the other cases are saying the bankruptcy code is superimposed upon all state law and all state law intent, and you look at the congressional intent and you look at the wording of the code.

So, Your Honor, I think that if the Court would focus on – we would suggest the Court focus on Judge Tice's reading of the word contingent in respect to the reading of the Grady case. The other case we would urge strongly to rely upon is the Ellis –

THE COURT: Well, of course, your client never listed this as a contingent liability.

MR. BAUMGARTNER: Your Honor, I don't believe that's a requirement under the code as to the definition of a claim, and definition of a debt, that it is listed as a contingent debt. I think contingent – the question really is, has there been notice to the creditors of obligation and if there's notice then does that underlying obligation come to the claim within the wording of the statute, not as far as how it's listed.

[32] I'm not aware of any case cited within the legions of cases that River Place has cited and we have cited that went toward how was it listed on the bankruptcy schedule, or rather what's the underlying obligation, look at the real essence of the transaction.

Your Honor, the last thing – or two final things. One is that River Place also relies upon that this is a cove-

nant running with the land. The cases they've cited apply state law in their particular states. In this particular state a covenant running with the land is if a personal liability that is severed that that does not sever in any way the burden that exists on the land. I've cited two Virginia Supreme Court cases dealing with that.

In one the Court specifically said that the person liability does not affect what they call the estoppel or the burden that existed on the land. There is no severance – or there can be severance of personal liability and burden on the land.

Second is of the reading of the underlying Real Estate Cooperative Act statute. I think it does not tie in personal liability to the ability to be able to make an assessment against the land and be [33] able to collect that assessment.

Assuming that those other cases were decided correctly on this covenant issue, those cases were fact-specific to the state on that case. In this case the statute just allows that there can be a lien and assessment on the land, and that it does not relate at all to the issue of is there a personal liability for the particular owner.

So under both common law and the enabling legislation we believe that that covenant can exist and that there's no impact on the covenant in respect to the personal liability.

The final thing, Your Honor, I would suggest is that there has been a lot of – within the briefs a lot of talk as far as the concept of fresh start and equities. And Your Honor, we would submit that in this particular case the equities rest very, very strongly upon Mr. Rosenfeld. That River Place has from day one had two options available to it.

One is that they could have terminated the lease because it was – under two theories. One is that there

was a default and it was not cured, and you are entitled to pursue your lease remedies under the [34] proprietary lease regardless of what happens to the bankruptcy. If the lease is not maintained and it's not current.

Second of all is that we contend the lease was rejected, and although we acknowledge that it was not part of the record we attached communications from the sister corporation to our most recent reply, from River Place North, from River Place North on March 30th, 1993, three weeks ago.

They advised Mr. Rosenfeld that they were treating the least as being rejected if it was not assumed within sixty days, and they were canceling it. They were taking – the sister corporation, River Place East, is taking exactly the opposite position that River Place North did in this case.

River Place East has other remedies available to them under the statute from day one, they could have foreclosed upon the premises, they could have re-let the premises, they could have taken any of the remedies that are outlined in Judge Tice's opinion and in our brief.

All those remedies against the land have been available to River Place East from day one, and [35] they've chosen not to do anything. Trust Bank has chosen not to do it. And Mr. Rosenfeld is left in a real quandary. He can't do anything and nobody will take any action with respect to that property.

There is a case cited in Judge Tice's opinion that I think is very salient on this point. It's the In Re Ryan case, and that deals with exactly this issue. If you don't – if this – if post-petition dues are not discharged as being a debt under the code, then it puts the association in a position of being able to hold a debtor hostage, and they know that if nobody will take title back from the debtor, the debtor is in the unfortunate situation of

continuing to own the property and that he – the assessments could continue to run against that debtor.

And if I can quote from Ryan it says, in essence this rationale, "A condominium association holds debtor hostage because it may elect not to foreclose initially and divest the debtor of title on one hand, and on the other the debtor cannot abandon the fee-simple title and walk away from those petitions, debts and obligations. This goes against the very essence of the code's fresh-start policy."

[36] And in fact if these dues – if nobody were to take title and this Court were to find that Mr. Rosenfeld didn't abandon it under Virginia State law and we do feel he did, then he's stuck in the position that that title – somebody may not do anything with that title for thirty years. And he would be in the position that he can't divest himself of that title. He couldn't get the fresh start.

I think it would be – it's up to River Place to have taken the remedies that have been afforded to them and they're expansive as far as foreclosing, evicting and terminating the lease, whatever, they have the remedies to afford this.

THE COURT: Well, on the appeal by the Board of Directors of River Place East, I will sustain that appeal. I think Judge Tice was in error in determining that these post-petition assessments were discharged. I disagree that – with the position that the right to payment arose pre-petition. The right to payment arose post-petition. And whether or not this was treated as a covenant with the land, I think that these payments were not discharged.

I do not think this lease theory which [37] is a little late appearing was the – nobody treated this as a lease.

And I don't think the relief from stay operates as an abandonment.

All, though, that I have before me on appeal is whether the River Place East is in contempt for pursuing the claim for these post-discharge co-op fees. And I find that since they were not discharged that the River Place East is not in contempt for pursuing the remedy to collect them.

There may be other defenses to the claim that River Place East asserts against Rosenfeld, and I don't want to determine what those defenses are or whether they are sufficient to defeat River Place East's claim.

All I hold is that because both co-op fees were not discharged that River Place East is not in contempt for violating the permanent injunction of 524(a) by filing suit to collect them. And I therefore reverse that decision.

Whether they can collect is another matter. But in light of this ruling there has not been determined yet whether River Place East or Rosenfeld is the prevailing party in the state court proceeding and [38] therefore attorney's fees are inappropriate at this time. Nor am I willing to impose sanctions because of the citation of Judge Bostetter's ruling or attachment of the bylaws to the brief.

So I would prepare the order reversing the judgment of Judge Tice on the appeal of River Place East and deny your appeal of Rosenfeld on the sanctions of attorney's fees. I'll prepare that order.

The Court will stand adjourned.

(Whereupon, at approximately 10:45 o'clock a.m., the hearing in the above-entitled matter was concluded.)

[39] CERTIFICATE OF COURT REPORTER

I, B. CHARLES HOPCHAS, a Verbatim Court Reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask, and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the action.

/s/ B. Charles Hopchas
B. CHARLES HOPCHAS
Court Reporter

APPENDIX E

In re: JEFFREY ROSENFELD, Debtor. RIVER PLACE EAST HOUSING CORPORATION, Board of Directors, Plaintiff-Appellee,

vs.

JEFFREY ROSENFELD, Defendant-Appellant.

No. 93-1596

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1994 U.S. App. LEXIS 9722

May 4, 1994, Decided

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (CA-93-58-A, BK-90-12716-AT).

COUNSEL

Argued: Robert Benton Baumgartner, Fairfax, Virginia, for Appellant.

Denise Lenore Palmieri, PALMIERI & PALMIERI, P.C., Vienna, Virginia, for Appellee.

On Brief: Robert L. Isaacs, Third Year Law Student, Fairfax, Virginia, for Appellant.

JUDGES

Before HAMILTON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation. Senior Judge Chapman wrote the opinion, in which Judge Hamilton and Senior Judge Young joined.

AUTHOR: CHAPMAN

OPINION

CHAPMAN, Senior Circuit Judge:

The issue presented is whether a discharge in bankruptcy relieves a debtor from personal liability for post-petition assessments of cooperative housing dues. The bankruptcy court held that post-petition assessments arise from a pre-petition contract and are therefore included in the discharge. The district court reversed and concluded that a cooperative's right to payment of post-petition dues not arise until the dues are assessed and were not discharged. We affirm the decision of the district court.

I.

River Place East Housing Corporation is a housing cooperative association which came into existence in 1982. In January 1983, Jeffrey Rosenfeld, an attorney, acquired 1590 shares of River Place and a possessory interest in a River Place apartment under a proprietary lease assigned to him by the prior owner. TrustBank Savings financed and holds a first deed of trust on Rosenfeld's River Place apartment. Rosenfeld acquired the River Place apartment as an investment and has never resided there.

A Declaration of Covenants, Easements and Liens ("the Declaration") creates and governs the River Place cooperative. The Declaration includes a covenant running with the land which obligates the owners of the cooperative to pay cooperative association dues as they are assessed. At some point Rosenfeld ceased to pay his dues, and River Place suspended his right to use the association's common areas and has never reinstated that right. This has caused appellant no inconvenience as he has never occupied his apartment nor recently rented it.

Rosenfeld filed Chapter 7 bankruptcy in October 1990. River Place was named, scheduled and noticed as a creditor. Rosenfeld listed the debt to River Place for unpaid pre-petition dues, but did not schedule post-petition dues as a potential liability or a contingent future obligation. He did not list his covenant to pay association dues as an executory contract. He did not list his cooperative interest as an asset or a lease interest, but incorrectly stated that it was being foreclosed.

When Rosenfeld realized that TrustBank Savings had not foreclosed, he signed a consent order granting TrustBank relief from the automatic stay. Rosenfeld claimed that he intended to abandon all interest in the unit. TrustBank has not foreclosed, and Rosenfeld has asserted no ownership interest in the unit and has not leased the apartment to anyone since his bankruptcy petition, but he has not conveyed his interest to TrustBank in lieu of foreclosure or otherwise disposed of his interest. He is still the record title holder.

On February 13, 1991 the bankrtupcy court granted Rosenfeld a discharge, which included $2300 in pre-petition assessments of River Place dues.

In December 1991, River Place brought suit against Rosenfeld in state court seeking cooperative association dues from November 1, 1990 through April 30, 1992 and costs, attorney's fees, and interest. The post-petition assessments exceeded $3000 as of the date of the lawsuit.

In June 1992, Rosenfeld filed a Motion for Contempt against River Place in the bankruptcy court claiming that his bankruptcy discharge extinguished any personal liability for pre-petition and post-petition cooperative assessments, and therefore River Place's suit to collect post-petition assessments violated the permanent stay. Alternatively, Rosenfeld argued that the post-petition assessments were invalid because he had abandoned his cooperative interest and because the proprietary lease under which he held his possessory interest was unenforceable because such lease was not assumed by the bankruptcy trustee. Rosenfeld sought attorney's fees under Virginia Code Section 55-472(G).

The bankruptcy court found that River Place's right to payment for future assessments arose when Rosenfeld contracted to purchase his cooperative interest, but was contingent on Rosenfeld's continued ownership of the interest. It concluded that this debt was pre-petition because the obligation to pay existed pre-petition, even though payment was not due until post-petition, citing *In re A.H. Robins Co., Inc.*, 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd*, 839 F.2d 198 (4th Cir. 1988). The bankruptcy court found that Rosenfeld's personal liability for post-petition assessments had been discharged, and none of the exceptions to discharge contained in the Bankruptcy Code applied and that River Place violated the permanent stay by attempting to collect the post-petition assessments. It ordered River Place to discon-

tinue any further collection efforts, but denied Rosenfeld's request for sanctions because there was legal authority to support River Place's argument that the petition assessments were not discharged.

River Place appealed to the federal district court. Rosenfeld cross-appealed the bankruptcy court's failure to award attorney's fees or rule on the abandonment and least rejection issues. The district court found that 1) Rosenfeld is still the record owner of the River Place cooperative interest; 2) the post-petition assessments were not discharged; 3) River Place's suit to collect the post-petition assessments did not violate the permanent stay; 4) Rosenfeld did not effectively abandon his River Place interest; 5) Rosenfeld's River Place interest was never treated as a leasehold interest; and 6) Rosenfeld was not entitled to attorneys' fees because the issue of the prevailing party in the state court proceeding had not yet been resolved.

II.

We review the district court's conclusions of law *de novo* and its findings of fact under the "clearly erroneous" standard. *In re Green,* 934 F.2d 568, 570 (4th Cir. 1991).

A discharge in bankruptcy relieves the debtor of personal liability for all pre-petition debts but those excepted under the Bankruptcy Code. 11 U.S.C.A. 727 (West 1993). The Code defines "debt" as "liability on a claim." 11 U.S.C.A. 101(12) (West 1993). A "claim" is defined as a "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." 11 U.S.C.A. 101(5) (West 1993). Consequently, any

right to payment which arises prior to the bankruptcy constitutes pre-petition debt and is discharged, absent an applicable exception. The discharge operates to permanently stay any attempt to hold the debtor personally liable for discharged debts. 11 U.S.C.A. 524(a)(2) (West 1993).

The question of whether a bankruptcy discharge encompasses post-petition assessments has been addressed in the context of condominium association and homeowners' association dues with inconsistent results.* One line of cases treats the covenant to pay assessments as a contract. Under this view, an association's right to payment arises when the contract is made and is merely contingent on the debtor's continued ownership of the property. Thus, a claim for post-petition assessments arises pre-petition and is extinguished by the bankruptcy discharge. *In re Rosteck,* 899 F.2d 694, 697 (7th Cir. 1990); *Matter of Wasp,* 137 B.R. 71, 73 (Bankr. M.D. Fla. 1992); *In re Hodge,* Case No. 90-10275-AT (Bankr. E.D. Va. July 20, 1992); *In re Miller,* 125 B.R. 441, 443 (Bankr. W.D. Pa. 1991); *In re Cohen,* 122 B.R. 755, 758 (Bankr. S.D. Cal. 1991); *In re Turner,* 101 B.R. 751, 754-55 (Bankr. D. Utah 1989); *In re Elias,* 98 B.R. 332, 337 (N.D. Ill. 1989); *In re Montoya,* 95 B.R. 511, 514 (Bankr. S.D. Ohio 1988); *In re Behrens,* 87 B.R. 971, 975 (Bankr. N.D. Ill. 1988). The bankruptcy court in this case followed this analysis.

The district court's view was consistent with that line of cases which holds an association's claim for post-petition dues does not arise until the dues are assessed. *In*

*Although these cases involve slightly different types of ownership associations, they are instructive because the analysis of whether the debtor's liability for post-petition assessments is extinguished by the discharge is essentially the same.

re Raymond, 129 B.R. 354, 364 (Bankr. S.D.N.Y. 1991); *In re Hill,* 100 B.R. 907, 909 (Bankr. N.D. Ohio 1989); *In re Harvey,* 88 B.R. 860, 862 (Bankr. N.D. Ill. 1988); *In re Rink,* 87 B.R. 653, 654 (Bankr. D. Colo. 1987); *In re Horton,* 87 B.R. 650, 652 (Bankr. D. Colo. 1987). We agree with the district court.

The Virginia Real Estate Cooperative Act provides for allocation of a cooperative's common expenses among its owners pursuant to its declaration. Va. Code Ann. 55-444 (Michie 1986). Under River Place's declaration, assessments are made on an annual basis and each owner pays one twelfth of his annual assessment each month of the fiscal year. Assessments are used to pay for the upkeep of River Place's parking and recreational facilities and other common expenses. Each owner must pay assessments when due and is personally liable for assessments, but is not responsible for assessments or installments due after his ownership interest ceases.

The Declaration expressly states that it is a covenant running with the land and binds and inures to the benefit of all present and future owners. The Act requires that the Declaration be executed and recorded in the same manner as a deed. Va. Code Ann. 55-438 (Michie 1986). Rosenfeld never signed the Declaration itself, but his proprietary lease expressly provides that it is subject to the Declaration.

Under the Declaration, the obligation to pay assessments is a function of owning the land with which the covenant runs. Thus, Rosenfeld's obligation to pay the assessments arose from his continued post-petition ownership of the property and not from a pre-petition contractual obligation. *In re Raymond,* 129 B.R. at 364. The post-petition assessments were for the upkeep of

common areas and other common expenses during Rosenfeld's post-petition ownership. River Place's right to payment for post-petition assessments did not arise pre-petition and was not extinguished by Rosenfeld's bankruptcy discharge.

This court's decision in *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988), does not require a contrary result. *Grady* involved a plaintiff whose injuries from use of a Dalkon Shield did not become manifest until after the manufacturer had petitioned for bankruptcy. Grady argued that, under California law, her claim against Robins arose post-petition, when she knew or should have known of her injuries, and therefore the automatic stay did not apply to her claim. This court first found that bankruptcy law, not state law, determines which claims are covered by the automatic stay. *Id.* at 201-02. It then found that Mrs. Grady had a contingent pre-petition claim which was barred by the automatic stay. *Id.* at 203. The court stated:

> We do not believe that there must be a right to the immediate payment of money in the case of a tort or allied breach of warranty or like claim, as present here, when the acts constituting the tort or breach of warranty have occurred prior to the filing of the petition, to constitute a claim under 362(a)(1).

Id. at 203. Mrs. Grady's claim alleged a tort and arose from the insertion of the Dalkon Shield, which occurred pre-petition. River Place's claim is for assessments to cover expenses incurred during Rosenfeld's post-petition ownership of real property. *Grady* deals with a claim arising from a pre-petition tort, while this case involves a breach of a covenant running with the land that occur-

red post-petition, and we find *Grady* is clearly distinguishable.

Rosenfeld argues that under *Gregory v. Peoples*, 80 Va. 355 (1885), the fact that the covenant to pay dues runs with the land is irrelevant to a determination of his liability for post-petition assessments. Rosenfeld argues that a covenant running with the land is similar to a mortgage in that the personal liability is distinct from the burden on the land, and once personal liability is discharged, the covenant remains attached to the land only, and binds future owners of the land, but not the current owner. We disagree. We have considered the opinion in *Gregory v. Peoples*, and we find it not applicable to the present case.

Finally, Rosenfeld argues that it would be manifestly unfair and contrary to the Bankruptcy Code's policy of giving the debtor a "fresh start" to hold him personally liable for the post-petition assessments. He notes that River Place has alternative remedies for recovery of the assessments, because under Virginia law, a cooperative association has a lien on a cooperative interest for unpaid assessments and may evict the proprietary lessee and foreclose the lien. Va. Code Ann. 55-472(a) (Michie Supp. 1993). Rosenfeld's proprietary lease provides that River Place may then relet the unit and apply the proceeds to unpaid assessments. Rosenfeld also argues that it is unfair to hold him responsible for the cooperative dues when he has not exercised his possessory rights in the apartment by either residing in it or renting it out. He contends he is unable to sell his cooperative interest because the debt uncumbering it exceeds its fair market value, and he is thus permanently saddled with an ever-increasing liability for cooperative dues.

We find these arguments unconvincing. Rosenfeld's personal liability under the covenant to pay assessments is not destroyed by River Place's access to alternative remedies, and even if Rosenfeld has not exercised the benefits of ownership, as title holder he has the legal right to do so. In order to terminate his responsibility for assessments, Rosenfeld must transfer title to the property, if necessary by a deed in lieu of foreclosure. *In re Horton,* 87 B.R. at 652; *In re Rink,* 87 B.R. at 654. His consent to an order granting the mortgage holder relief from the automatic stay did not end his ownership.

We find that River Place's right to payment for the assessments at issue did not arise until post-petition, and we affirm the district court's holdings that Rosenfeld's liability for the post-petition assessments was not discharged and that River Place did not violate the permanent stay by suing to collect the post-petition assessments.

III.

Rosenfeld contends that he is no longer the record owner of the apartment because by granting TrustBank Savings relief from the automatic stay he abandoned his interest in the apartment in a court of law. He argues that ownership of real property may be disclaimed in a court of record, as well as by deed, citing *Southern Ry. v. Gregg,* 43 S.E. 570, 573 (Va. 1903). Rosenfeld cites no support for the proposition that granting a secured creditor relief from the automatic stay divests the debtor of ownership of the property that secures the debt. The *Gregg* facts are so dissimilar and the legal question so different that it has no application here. In addition, the Declaration provides that an owner may not avoid

personal liability for assessments by waiver, non-use or abandonment of the property.

We agree with the district court that Rosenfeld remains the owner of the River Place apartment.

IV.

Rosenfeld argues that his cooperative interest is an unexpired lease which was deemed rejected by operation of law because the bankruptcy trustee did not assume it within 60 days of his petition. *See* 11 U.S.C.A. 365(d)(1) (West 1993). He contends that the trustee's failure to assume the proprietary lease terminated his obligation to pay cooperative dues. The facts contradict Rosenfeld's characterization of the cooperative interest, as he did not list the cooperative interest as a lease on his bankruptcy petition and obtained a mortgage on his cooperative interest.

More importantly, Rosenfeld's argument is not supported by the statute. The cooperative interest is defined as "an ownership interest in the [cooperative] association coupled with a possessory interest in a unit under a proprietary lease." Va. Code Ann. 55-426 (Michie 1986). Any transfer of an ownership interest in an association without the possessory interest in the unit to which the ownership interest is related is void. Va. Code Ann. 55-444(E) (Michie 1986). Thus, the possessory interest granted by the proprietary lease is inseparable from the ownership interest in the cooperative. The proprietary lease is not a lease in the traditional sense, but a method of indicating in which of the commonly-owned apartments a particular owner has a possessory interest. Rosenfeld retains title to his cooperative interest and the possessory interest in his apartment as well.

If the cooperative interest is considered a lease and deemed rejected by the trustee, the lease would not necessarily have been terminated. There is case law holding that rejection of a lease does not automatically terminate the lease, but abandons the lease to the debtor's control outside the bankruptcy estate. *In re Empire Knitting Mills, Inc.*, 123 B.R. 688, 691 (Bankr. D. Me. 1991); *In re Picnic 'N Chicken, Inc.*, 58 B.R. 523, 526 (Bankr. S.D. Cal. 1986); *In re Storage Technology Corp.*, 53 B.R. 471, 475 (Bankr. D. Colo. 1985).

V.

The district court's refusal to award attorney's fees and costs is reviewed fot abuse of discretion. *See In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322 (9th Cir. 1991). The prevailing party in an action to recover nonpayment of cooperative assessments is entitled to attorney's fees and costs. Va. Code Ann. 55-472(G) (Michie Supp. 1993). The district court correctly found that the matter of the prevailing party in state court had not yet been resolved. We find no abuse of discretion, and therefore affirm.

VI.

For the reasons herein stated, the decision of the district court is affirmed.

AFFIRMED

DISPOSITION

AFFIRMED

APPENDIX F

[Filed June 2, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1596
CA-93-58-A
BK-90-12716-AT

In re: JEFFREY ROSENFELD
Debtor

RIVER PLACE EAST HOUSING CORPORATION,
Board of Directors
Plaintiff-Appellee

v.

JEFFREY ROSENFELD
Defendant-Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

APPENDIX G

CHAPTER I

General Provisions

SECTION 101 (11 U.S.C. § 101)

§ 101. Definitions. In this title–

(1) "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) "affiliate" means–

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities–

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities–

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement;

(3) "Federal depository institutions regulatory agency" means–

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation;

(4) "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

(5) "claim" means–

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(6) "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761(9) of this title;

(7) "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case;

(8) "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

(9) "corporation"–

(A) includes –

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses,

(ii) partnership assocoation organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership;

(10) "creditor" means–

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

(11) "custodian" means–

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

(12) "debt" means liability on a claim;

(13) "debtor" means person or municipality concerning which a case under this title has been commenced;

(14) "disinterested person" means person that–

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition a director, officer or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

(16) "equity secutity" means—

(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph;

(17) "equity security holder" means holder of an equity security of the debtor;

(18) "family farmer" means–

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded;

(19) "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title;

(20) "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person;

(21) "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state;

(21A) "farmout agreement" means a written agreement in which–

(A) the owners of a right to drill, product, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property;

(22) "financial institution" means a person that is a commercial or savings bank, industrial savings bank, savings and loan association, or trust company and, when any such person is acting as agent or custodian for a

customer in connection with a securities contract, as defined in section 741(7) of this title, such customer;

(23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

(24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding;

(25) "forward contract" means a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon;

(26) "forward contract merchant" means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;

(27) "govenmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

(28) "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor;

(29) "indenture trustee" means trustee under an indenture;

(30) "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker;

(31) "insider" includes–

(A) if the debtor is an individual–

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation–

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership–

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor;

(32) "insolvent" means–

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of–

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A) (i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due;

(33) "institution-affiliated party"—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u)); and

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act (12 U.S.C. 1786(r));

(34) "insured credit union" has the meaning given it in section 101(7) of the Federal Creidt Union Act (12 U.S.C. 1752(7));

(35) "insured depository institution"–

(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2)); and

(B) includes an insured credit union (except in the case of paragraphs (3) and (33)(A) of this subsection);

(36) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

(38) "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments; and [*sic*]

(39) "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade;

(40) "municipality" means political subdivision or public agency or instrumentality of a State;

(41) "person" includes individual, partnership, and corporation, but does not include governmental unit. *Provided, however,* that any governmental unit that acquires an asset from a person as a result of operation of

a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title;

(42) "petition" means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title;

(43) "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

(44) "railroad" means common carrier by railroad engaged in the transportation of individuals or property, or owner of trackage facilities leased by such a common carrier;

(45) "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

(46) "repo participant" means an entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has an outstanding repurchase agreement with the debtor;

(47) "repurchase agreement" (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit,

eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;

(48) "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1), or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act (15 U.S.C. 78c(12)) for the purposes of such section 17A;

(49) "security"–

(A) includes–

(i) note;

(ii) stock;

(iii) treasury stock;

(iv) bond;

(v) debenture;

(vi) collateral trust certificate;

(vii) pre-organization certificate or subscription;

(viii) transferable share;

(ix) voting-trust certificate;

(x) certificate of deposit;

(xi) certificate of deposit for security;

(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the

Securities Act of 1933 (15 U.S.C. 77a et seq.), or is exempt under section 3(b) of such Act (15 U.S.C. 77c(b)) from the requirement to file such a statement;

(xiii) interest of a limited partner in a limited partnership;

(xiv) other claim or interest commonly known as "security"; and

(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include–

(i) currency, check, draft, bill of exchange, or bank letter of credit;

(ii) leverage transaction, as defined in section 761(13) of this title;

(iii) commodity futures contract or forward contract;

(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;

(v) option to purchase or sell a commodity;

(vi) contract or certificate of a kind specified in subparagraph A(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 (15 U.S.C. 77c(b)) from the requirement to file such a statement; or

(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered;

(50) "security agreement" means agreement that creates or provides for a security interest;

(51) "security interest" means lien created by an agreement;

(52) "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title;

(53) "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

(54)* "stockbroker" means person–

(A) with respect to which there is a customer, as defined in section 741(2) of this title; and

(B) that is engaged in the business of effecting transactions in securities–

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account;

(55)* "swap agreement" means–

(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap agreement, rate floor

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*[*Ed. Note:* Due to a drafting error in the amending legislation, section 101 contains two each of numbered paragraphs (54) through (57). *See* Comment to the 1990 Amendments *infra*.]

agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

(B) any combination of the foregoing; or

(C) a master agreement for any of the foregoing together with all supplements;

(56)* "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor;

(57)* "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan;

(54)* "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting wit property or with an interest in

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*[*Ed. Note:* Due to a drafting error in the amending legislation, section 101 contains two each of numbered paragraphs (54) through (57). *See* Comment to the 1990 Amendments *infra*.]

property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

(55)* "United States," when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States;

(56)* "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law; and

(57)* "mask work" has the meaning given it in section 901(a)(2) of title 17.

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*[*Ed. Note:* Due to a drafting error in the amending legislation, section 101 contains two each of numbered paragraphs (54) through (57). *See* Comment to the 1990 Amendments *infra*.]

APPENDIX H

SECTION 523 (11 U.S.C. §523)

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–

(1) for a tax or a customs duty–

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required–

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing–

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 *et seq.*);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice

or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a govern-

mental unit, and is not compensation for actual pecuniary loss, other than a tax penalty–

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless–

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act; or

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3) or under section 733(g) of the Public Health Service Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a

hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a depository institution or insured credit union shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

APPENDIX I

SECTION 524 (11 U.S.C. §524)

§524. Effect of discharge.

(a) A discharge in a case under this title–

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)-(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whetheror not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is

filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that such agreement–

(A) represents a fully informed and voluntary agreement by the debtor; and

(B) does not impose an undue hardship on the debtor or a dependent of the debtor;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as–

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this

title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section, then the court shall hold a hearing at which the debtor shall appear in person and at any such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement;

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

APPENDIX J

SECTION 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise

of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under

sections 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under sections 1228 or 1328 of this title, or under sections 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least–

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

APPENDIX K

§55-472. Remedies for nonpayment of assessments. – A. The association has a lien on a cooperative interest for any assessment levied against that cooperative interest or fines imposed against its owner from the time the assessment or fines become due. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to subdivisions 11 and 12 of §55-459 subsection A are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due. Upon nonpayment of the assessment, the proprietary lessee may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section. The association's lien may be foreclosed: (i) by judicial sale in like manner as a mortgage on real estate; or (ii) by power of sale as provided in subsection I.

B. A lien under this section is prior to all other liens and encumbrances on a cooperative interest except: (i) liens and encumbrances on the cooperative which the association creates, assumes or takes subject to; (ii) any first security interest encumbering only the cooperative interest of a proprietary lessee and perfected before the date on which the assessment sought to be enforced became delinquent; and (iii) liens for real estate taxes and other governmental assessments or charges against the cooperative or the cooperative interest. The lien is also prior to the security interests described in (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pur-

suant to §55-459 subsection A which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association. The lien under this section is not subject to homestead or other exemptions.

C. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

D. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation or filing of any claim of lien for assessment under this section is required.

E. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessment becomes due.

F. This section does not prohibit actions to recover sums for which subsection A creates a lien or prohibit an association from taking a transfer in lieu of foreclosure.

G. A judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party.

H. The association upon written request shall furnish to a proprietary lessee a statement setting forth the amount of unpaid assessments against his cooperative interest. The statement must be in recordable form. The statement must be furnished within ten business days

after receipt of the request and is binding on the association, the executive board and every proprietary lessee.

I. The association, upon nonpayment of assessments and compliance with this subsection, may sell the cooperative interest. Sale may be at a public sale or by private negotiation and at any time and place, but every aspect of the sale, including the method, advertising, time, place and terms, must be reasonable. The association shall give to the proprietary lessee and any sublessees of the proprietary lessee reasonable written notice of the time and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the cooperative interest which would be cut off by the sale, but only if the interest was on record seven weeks before the date specified in the notice as the date of any public sale, or seven weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until five weeks after the sending of the notice. The association may buy at any public sale, and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

J. The proceeds of a sale under subsection I shall be applied in the following order:

1. The reasonable expenses of sale;

2. The reasonable expenses of securing possession before sale; holding, maintaining and preparing the cooperative interest for sale, including payment of taxes and other governmental charges, premiums on hazard and

liability insurance, and to the extent provided for by agreement between the association and the proprietary lessee, reasonable attorney's fees and other legal expenses incurred by the association;

3. Satisfaction in the order of priority of any prior claims of record;

4. Satisfaction of the association's lien;

5. Satisfaction in the order of priority of any subordinate claim of record; and

6. Remittance of any excess to the proprietary lessee. Unless otherwise agreed, the proprietary lessee is liable for any deficiency.

K. If a cooperative interest is sold under subsection I, a good faith purchaser for value acquires the proprietary lessee's interest in the cooperative interest free of the association's debt which gave rise to the lien under which the sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale under subsection I shall execute a conveyance to the purchaser sufficient to convey the cooperative interest which states that the conveyance is executed by him, after a foreclosure by power of sale of the association's lien and that he has power to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of nonpayment of the assessment and of the giving of the notices required by subsection I are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

L. At any time before the association has disposed of the cooperative interest or entered into a contract for its disposition under the power of sale, the proprietary lessee or the holder of any subordinate security interest may cure the proprietary lessee's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. (1982, c. 277; 1990, c. 831.)

APPENDIX L

RICHMOND.

GREGORY v. PEOPLES.

March 19th, 1885.

1. Warranty of Title—*Estoppel.*—Where one conveys land with general warranty, whereof at the time he has not the title, but afterwards acquires it, such acquisition enures to the grantee. *Raines* v. *Walker,* 77 Va. 92. The warrantor is estopped from denying he had the title.

2. Idem—*Bankruptcy—Estoppel.*—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Bush* v. *Person,* 18 Howard, 82.

3. Idem—*Idem—Resulting trust.*—Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, *with another's money,* buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title *does not* enure to his grantee, and he is *not estopped* to deny he had the title, because a trust resulted in favor of him whose money bought the land.

4. Fraud—*Purchaser for value without notice.*—On doubtful evidence fraud must not be assumed. It must be distinctly alleged in the bill, and clearly proved. And so, of the defence of purchaser for value without notice.

Appeal from decree of circuit court of Mecklenburg county, entered May 29th, 1882, in suit of Robert H. Gregory against J. M. Sloan, sheriff, and administrator of Lewis J. Peoples, deceased, John R. Haskins and N. M. Norwood. In 1863, Haskins conveyed with general warranty land in said county to Peoples. He had not then the legal title. A part of the purchase money due from him was unpaid, and the title was withheld. In 1869, a suit was brought to collect the same, and the land was resold therefor. With Norwood's money, Haskins purchased the land at the resale, and the title was conveyed to him in 1870. But, in 1868, he had received his discharge in bankruptcy. Peoples occupied the land from the date of his purchase in 1863, till his death in 1879. Shortly before his death, he sold and conveyed it to Gregory, subject to certain judgments against Peoples in his lifetime. In 1880, Gregory filed his bill praying that his title might be cleared and quieted. He claimed that the legal title obtained by Haskins in 1870, enured to Peoples, and through him to his grantee; and that Haskins' warranty estopped him from denying he had the title. In March, 1880, the circuit court so decreed. Afterwards, Haskins and Norwood, who were non-residents, appeared and defended the suit. They set up Haskins' bankruptcy, and insisted that its effect was to release Haskins of the warranty, and that consequently his subsequent acquisition of the title did not enure to Peoples, and that a trust resulted in favor of Norwood, whose money had bought the land. In reply, Gregory contended that taking the deed in Haskins' name, was intended as a fraud on Norwood's creditors, and that no trust could result from a fraud. But there was no sufficient proof to establish any fraud, or that Norwood owed any debts. By its decree of May, 1882, the circuit

court reversed the decree of March, 1880, and sustained both defences. From this decree Gregory appealed to this court.

Finch & Atkins, for the appellant.

R. T. Thorp, for the appellee.

LEWIS P., delivered the opinion of the court.

In respect to the first ground of defence relied on in the court below, little need be said. It was claimed that by his discharge in bankruptcy Haskins was released from the obligation of his covenant to warrant the title to the land conveyed by him, and that consequently the subsequent conveyance of the legal title to him did not enure to the benefit of his grantee. This contention would be well-founded if the case of the appellant rested solely on the personal liability of Haskins, growing out of his covenant. But it does not. Such a covenant is not only one running with the land, for the breach of which the covenantor is liable in an action for damages, but is something more. By its operation a paramount title, subsequently acquired by him enures to the benefit of the covenantee, and in equity he is estopped from asserting that any outstanding title existed inconsistent with what he undertook to convey. It has therefore been held that a discharge in bankruptcy, while effectual to release the covenantor from liability in an action for a breach of the covenant, does not at all affect the estoppel. This is on the ground that, as the release is by force of the statute, and not by the act of the covenantee, or those claiming under him, no greater effect will be given to it than is warranted by the terms of the statute; and for the further reason that existing personal liability is not necessary to work an estoppel, and consequently there is no necessary connection between the personal liability of the debtor

on his covenant and the estoppel which arises therefrom. Such was the decision of the supreme court of the United States, in a case arising under the bankrupt act of 1841. *Bush* v. *Person,* 18 How. 82. And what is there said as to the effect of a discharge under the act of 1841, equally applies to the act of 1867, under which the defendant, Haskins, was discharged.

Upon the second ground, however, the defence is fully sustained. It is true, as we have seen, that where land in which the grantor has only an equitable estate is conveyed by deed with general warranty, the subsequent acquisition of the legal title by the grantor enures to the benefit of the grantee and those claiming under him. *Doswell* v. *Buchanan's ex'or,* 3 Leigh, 365; *Burtners* v. *Keran,* 24 Gratt. 42; *Raines* v. *Walker,* 77 Va. 92. But in the present case the evidence is conclusive, and indeed, uncontradicted, that the purchase money for the land was wholly advanced by Norwood, and that in purchasing at the re-sale in 1869, Haskins acted as Norwood's agent, though the deed was made to Haskins. Under these circumstances a trust resulted in Norwood's favor, and consequently in equity Haskins must be regarded as holding the legal title as a mere trustee for Norwood. 2 Minor's Insts. 191; *Bank of the U. S. v. Carrington,* 7 Leigh, 566; *Kane* v. *O'Conners,* 78 Va. 76, and cases cited. No title, therefore, was acquired by Haskins upon which any estoppel growing out of his deed to Peoples can operate in the appellant's favor.

It is insisted, however, that Norwood's object in causing the deed to be made to Haskins, was to cover up his estate to defraud his creditors, and that no trust can result from a fraud. To the first branch of this proposition several answers are furnished by the record. In the first place, the evidence relied on to establish fraud is

vague and unsatisfactory. It consists solely of the appellant's own deposition, in which he testifies to certain admissions which he says were made to him by Norwood and Haskins, to the effect that the deed was taken in the latter's name, because the former, who was a tobacco manufacturer, was at the time, "in some trouble with the revenue department, and that he did not want to have the deed made to himself until that was settled." It does not appear, however, what the "trouble" was, or that Norwood was indebted, or that any pecuniary demand had then, or has since, been asserted against him by any one. Haskins testifies that Norwood being liable as his surety on the bonds for the deferred payments, executed by him at the time of the first sale, requested him to attend the second sale and "make the land bring the debt," which he did, and that the deed was taken in his name because he transacted all the business. "That," he says, "was the reason, and the only reason that I know."

It is obvious that this testimony falls short of establishing the fraud upon which the appellant relies. "Fraud," said the court in *Hord's adm'r* v. *Colbert*, 28 Gratt. 49, "is not to be assumed on doubtful evidence, or circumstances of mere suspicion. The party alleging the fraud must clearly and distinctly prove it. * * If the fraud is not clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief can be had."

Moreover, it appears that Peoples, the appellant's grantor, had notice of the re-sale in 1869, and that he subsequently, and before his conveyance to the appellant, who was his step-son, acknowledged Norwood's title by

becoming his tenant. This is averred in Norwood's answer, and the averment is sustained by the proof. Thus, in a letter written by him to Norwood, dated August 24, 1876, he says: "I will take the land here another year on the same terms as this year. * * I will give $150 for your interest in the land for next year." This letter purports to have been written from the writer's post-office, which was on the North Carolina side of the state line; and from this fact it is argued by counsel for appellant that the land here referred to was a tract of land owned by Norwood, in the same neighborhood, and lying in North Carolina. But this idea is repelled by the circumstance, that the writer was at the time living on the land in controversy, and also by the amount of the rent offered. The sum offered was $150, and the evidence shows, or strongly tends to show, that the annual rental value of the North Carolina land did not exceed the sum of $75. In addition to this is the testimony of the witness, W. A. Quincy, who testifies, that after the sale in 1869, Peoples advised him to buy of Norwood the land in controversy.

But independently of the evidence, the question of fraud may be laid out of the case, inasmuch as no such issue is properly raised by the pleadings. Fraud, since it must be clearly proved, must be distinctly alleged; and here no such charge is to be found in the bill. The only way in which it was sought to be raised was by *the replications to the pleas of bankruptcy*. If intended to be relied on by the plaintiff, it should have been charged in the bill, and an opportunity thereby afforded the defendants to meet it in their answers. Kerr on Fraud and Mistake, 365. And the same may be said in respect to the claim, asserted for the first time in this court, that the appellant was a purchaser for value, and without

notice of Norwood's claim, and therefore not affected thereby. It is not so charged in the bill, nor is it shown by the evidence, and the contrary is emphatically averred by Norwood in his answer. The decree is affirmed.

HINTON, J., dissented.

DECREE AFFIRMED.

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(2)

NO. 94-170

In The

Supreme Court of the United States

October Term, 1994

JEFFREY ROSENFELD,

Petitioner,

v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Bankruptcy Court's discharge of the debtor's pre-petition debts include cooperative maintenance assessments levied during the debtor's post-petition ownership of the real property?

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NO. 94-170

In The

Supreme Court of the United States

October Term, 1994

JEFFREY ROSENFELD,

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v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Respondent, River Place East Housing Corporation (hereinafter, "River Place") respectfully submits the following Brief in Opposition in order to address certain omissions of fact from the Petition for Writ of Certiorari and responds to Petitioner's Question Presented.

STATEMENT OF THE CASE

Jeffrey Rosenfeld, the Petitioner, (hereinafter "Rosenfeld") is an experienced and sophisticated real estate attorney (4th Cir. Appendix p.293, lines 17-23 & 294 lines 1-11) who acquired a cooperative Unit. In his bankruptcy petition, Rosenfeld initially listed the Unit as having been taken by foreclosure by Trustbank, the holder of the first trust. He did not list the Unit as a potential liability or contingent future obligation. When he realized that Trustbank had not yet foreclosed, Rosenfeld signed a Consent Order affording Trustbank relief from the automatic stay to foreclose its trust against the Unit. Rosenfeld has not, however, executed a deed in lieu of foreclosure to Trustbank although he argues that the Unit is an "albatross" which no one is willing to foreclose or take title. Rosenfeld, as the record owner of the Unit, is able to convey title to anyone he chooses, to occupy or rent the apartment, to redeem his interest prior to foreclosure by any lienholder, to list his loss of income as a tax deductible expense and to exercise a host of other benefits and rights afforded under the covenants and state law; to date he has voluntarily chosen not to avail himself of such rights and benefits.

Although Rosenfeld argues to the Court that the cooperative maintenance assessment assessed by River Place after his petition constitutes pre-petition discharged debt, on his Schedule of Current Expenditures, he listed his continuing obligation for homeowners association assessments to other associations to which he is a member. (4th Cir. Appendix p.68 ¶1(d)).

When Rosenfeld filed his petition, he discharged approximately $2,300 in pre-petition cooperative assessments (42a) and, by the time River Place filed suit in state court against Rosenfeld, the post-petition maintenance assessments exceeded $3,000 (43a). The post-petition cooperative

maintenance assessments were for the upkeep of the common areas and other common expenses which arose during Rosenfeld's post-petition ownership. (47a)

REASONS FOR DENYING THE WRIT

The decision of the Fourth Circuit Court of Appeals was wholly consistent with the rulings of this Court. Although there is disagreement between the Fourth and Seventh Circuit Courts of Appeals with regard to this issue, impending legislation by Congress amending the Bankruptcy Code to clarify any question as to whether assessments for community associations are intended to be pre-petition debt invokes the doctrine of political question warranting abstention by this Court. Moreover, judicial economy dictates a denial of the Writ since the impact of any ruling by this Court would be de minimus and short-lived under the impending legislative clarification and steady decline in bankruptcy filings nationwide.

I. CONGRESSIONAL INTENT IS CLEAR

There is no question that the assessments at issue in this case were levied during the time after the debtor's petition in bankruptcy was filed. There is no confusion regarding Congress' intent that the assessments which were levied prior to the debtor's petition are intended to be discharged as pre-petition debt. All of the cases cited in Rosenfeld's Petition and in the few other cases addressing this issue nationally share this single consistent thread. The controversy stems from the characterization of the assessments which are declared or fall due after the petition in bankruptcy is filed.

Some courts, like the Bankruptcy Court in this case, have ruled that the assessments arise from a pre-petition contract

and are, therefore, pre-petition claims[1] while others, like the Fourth Circuit Court of Appeals in this case, have ruled that the assessments arise from a covenant running with the land and are, therefore, a post-petition debt of the debtor.[2] The cases evidence the uncertainty of the courts with regard to this question. Rosenfeld argues that the assessments are a pre-petition, contingent liability and are, therefore, discharged. He claims this is necessary to afford him the "fresh start" intended by Congress and yet, for his principal residence, he lists homeowners association assessments as a continuing post-petition liability for which he is obligated.

On p.16 of his Petition, in Footnote 11, Rosenfeld states that "[he] does not contend that a debtor should be allowed to live in a residence and not pay homeowner's association dues." It seems to the Respondent that the pre or post-petition

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[1] In Re Rosteck, 899 F.2d 694 (7th Cir. 1990); In Re Affeldt, 164 B.R. 628 (Bankr. D.Minn. 1994); In Re Elias, 98 B.R. 332 (Bankr. N.D.Ill. 1989); Matter of Wasp, 137 B.R. 71 (Bankr. M.D.Fla. 1992); In Re Miller, 125 B.R. 441 (Bankr. W.D.Pa. 1991); In Re Cohen, 122 B.R. 755 (Bankr. S.D.Cal. 1991); In Re Turner, 101 B.R. 751 (Bankr. D.Utah 1989); In Re Montoya, 95 B.R. 511 (Bankr. S.D.Ohio 1988); and In Re Behrens, 87 B.R. 971 (Bankr. N.D.Ill. 1988).

[2] In Re Rosenfeld, 23 F.3d 833 (4th Cir. 1994); In Re Val Moritz Invest. Group, Ltd., 116 B.R. 257 (Bankr. D.Colo. 1990); In Re Raymond, 129 B.R. 354 (Bankr. S.D.N.Y. 1991); In Re Hill, 100 B.R. 907 (Bankr. N.D.Ohio 1989); In Re Wetherbee, 1989 WL 110796 (Bankr. D.Colo. March 13, 1989); In Re Harvey, 88 B.R. 860 (Bankr. D.Colo. 1988); In Re Rink, 87 B.R. 653 (Bankr. D.Colo. 1987); In Re O'Mara, 141 B.R. 237 (Bankr. M.D.Fla. 1992); In Re McNeil, 128 B.R. 603 (Bankr. E.D.Pa. 1991); In Re Lenz, 90 B.R. 458 (Bankr. D.Colo. 1988); In Re Stern, 44 B.R. 15 (Bankr. D.Mass 1987); and In Re Strelsky, 46 B.R. 178 (Bankr. E.D.Va. 1985).

nature of the obligation should not change based on whether the debtor enjoys use of the property since, in all instances, he has the "right" to make use of the property. If the debt is "contingent" and, therefore, pre-petition, then it is not a post-petition debt of the debtor after discharge and any efforts to collect the debt would be improper. Even Rosenfeld, in his Petition, seems uncertain as to whether community association assessments are always pre-petition or always post-petition.

The question presented to the Fourth Circuit Court of Appeals, and now to this Court, is whether cooperative maintenance assessments levied after the filing of Rosenfeld's bankruptcy petition were within the Bankruptcy Code's definition of a "claim" and, therefore, discharged as pre-petition debt. Rosenfeld argues that the Fourth Circuit Court of Appeals misapplied federal law in finding that the debt arose post-petition. Rosenfeld rests his argument upon this Court's rulings in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991) and Pennsylvania Department of Public Welfare v. Davenport, 110 S.Ct. 2126 (1990) in which this Court found that the word "claim", as used in the Bankruptcy Code, was not plain upon its face and accordingly interpreted the statute to determine the meaning of "claim". River Place asserts that the ruling of the Fourth Circuit Court of Appeals is not inconsistent with those rulings and, further, that rudimentary principles of statutory construction and the express language of the drafters of the Code support the ruling of the Fourth Circuit Court of Appeals.

In both Johnson and Davenport, the Court turned to the legislative history behind the Bankruptcy Code to determine the legislature's goal in using the term "claim". Certainly, over time, references to legislative history have been essential in understanding Congress' intent. This Court's reference to the written history of such statutory provisions when the drafters are no longer available is well documented.

In this particular matter, Congress has recognized that there may have been some question as to its intent in using the term "claim" and has undertaken efforts to promptly clarify its meaning with respect to post-petition condominium and cooperative maintenance assessments. The Fairness to Condominium and Cooperative Owners Amendment of 1993 (hereinafter, the "Amendment"),[3] facing imminent passage by Congress, specifically clarifies that maintenance assessments levied after the filing of a debtor's bankruptcy petition are not dischargeable as a pre-petition claim.

Statutory interpretation is useful where Congress' intent is uncertain as in the instances under which Johnson and Davenport were decided. In the instant case, the statutory interpretation is simplified. Who better to advise the Court in its statutory interpretation than the drafters themselves. The Amendment was crafted by those responsible for drafting the Code - those with the position of establishing the statute and best informing us of the reasons for their drafting. In fact, the two leading co-sponsors in the Senate, Senators Di Concini and Thurmond, were instrumental in the drafting of the 1978 Act and have drafted this language to clarify any misconceptions about their intent regarding this specific issue under the Bankruptcy Code. It has been adopted by the Senate and has sixty-one (61) co-sponsors and clear signs of passage by the House of Representatives before the end of the year.

This Amendment offers the Court the clearest statutory construction available, the language of the drafters, to clarify

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3 House Resolution 1593, titled the Fairness to Condominium and Cooperative Owners Amendment of 1993, introduced by Representative Hyde of Illinois on April 1, 1993 and Section 312 of Senate Bill 520, known as the Thurmond/ Helms Amendment No. 1635, was adopted by the Senate on April 20, 1994 with a vote of 94 yeas and 0 nays.

any previous confusion which resulted from their language choices. The language of the amendment is not merely the musings of a Congressional staffer or the pontifications of a Congressional witness, it is the actual language of the future law. That language which embodies the express meaning and intent of the legislators - evidencing the outrage of their constituents that debtors would otherwise be able to discharge both pre-petition and post-petition maintenance assessments (for which all non-bankrupt co-owners must pay a proportionate share). While Congress, the judiciary and the public recognize the utility of allowing debtors to discharge pre-petition maintenance assessments, this Amendment is designed to ensure no misunderstanding of the true nature of post-petition maintenance assessments as non-dischargeable debt. It is the position of River Place that this information will guide the Court in using elements of statutory construction and the plain meaning of Congress to confirm the ruling of the Fourth Circuit which was, in all regards, consistent with the legislature's intent and with this Court's prior rulings.

II. JUDICIAL ECONOMY WARRANTS DENIAL

Taking action at this time is unwarranted, given the imminent actions of the legislature. The doctrine of abstention would urge the Court to defer ruling where its actions require an initial policy decision not within its judicial discretion and where its actions will be rendered nugatory in a brief period of time leading to the potential embarrassment of multifarious pronouncements by various branches on this single question. U.S. v. Munoz-Flores, 110 S.Ct. 1964 (1990); and Baker v. Carr, 369 U.S. 186 (1962).

To the extent that the Court finds a controversy to exist, River Place asserts that the controversy is a de minimus one,

not worthy of the Court's attention at this time. To date, only two circuits have seen fit to address this topic and only twenty cases are reported as addressing this issue throughout the nation.[4] Principles of judicial economy dictate that a controversy of such minimal impact, especially given the decline in the number of bankruptcy filings nationally and the pending legislative initiative to fully resolve the controversy, is not yet ripe for a ruling by this Court.

CONCLUSION

The ruling of the Fourth Circuit Court of Appeals, while different from that of the Seventh Circuit Court of Appeals, is consistent both with the rulings of this Court and with the legislative intent and should not be disturbed. Moreover, given the minimal impact of this issue, as evidenced by the few cases addressing the topic, and the near certainty that any ruling by this Court will be deemed nugatory in a short time by legislative fiat, this Court should deny Rosenfeld's Petition for a Writ of Certiorari.

Respectfully Submitted,

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August 26, 1994

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4 See Footnotes 1 and 2, supra.

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No. 94-170

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY ROSENFELD,

Petitioner,

vs.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

As its *sole* basis for opposing the Petition for Writ of Certiorari, River Place East Housing Corporation (hereinafter referred to as "River Place") brought to the Court's attention that new legislation regarding the dischargeability of post-petition cooperative assessments is pending in Congress. Without quoting the actual text

of the proposed amendments, River Place incorrectly summarized the proposed legislation on page 6 of their Brief in Opposition:

> "The Fairness to Condominium and Cooperative Owners Amendment of 1993 (hereinafter, the "Amendment") facing immiment passage by Congress, specifically clarifies that maintenance assessments levied after the filing of a debtor's bankruptcy petition are *not* dischargeable as a pre-petition claim."

River Place mischaracterizes the proposed amendments to 11 U.S.C. §523 passed by the Senate[1] and pending in the House of Representatives[2] (hereinafter collectively referred to as "proposed amendments"). The proposed amendments are *very* limited in scope. The House of Representative's version applies only to owners of condominiums and cooperatives who continue to *occupy* the dwelling unit; while the Senate version only applies to owners of condominiums and cooperatives who continue to *occupy* the dwelling unit *or receive rental* payments from a tenant of the dwelling unit. (2a, 4a). Congress is attempting to correct the anomaly of a debtor who lives in or receives rental income from his condominium or cooperative dwelling unit while enjoying immunity from *in personam* liability for accruing assessments.

The limited scope of the proposed Congressional amendments do not change, and in fact *magnify*, the need of this Court to resolve the issues raised in Rosenfeld's Petition. The proposed amendments do not

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[1] House Resolution 1583, titled the Fairness to Condominium and Cooperative Owners Amendment of 1993. (1a).

[2] Section 311 of Senate Bill 540 known as the Thurmond/Helms Amendment No. 1635. (3a).

address the voluminous cases where the debtor's use of the dwelling unit does not fall within the specific uses enumerated in the proposed amendments[3]. Furthermore, the proposed amendments are still only proposals, which have not and may not be enacted. They should not be used as a basis for the denial of the Petition.

ARGUMENT

I.

THE PROPOSED AMENDMENTS SHOULD NOT BE A BASIS FOR DENYING THE WRIT OF CERTIORARI BECAUSE THE PROPOSED AMENDMENTS HAVE NOT BEEN, AND MAY NEVER BE, ENACTED INTO LAW.

River Place suggests that the existence of pending legislation is a valid basis for denying a Petition for a Writ of Certiorari. Although this Court has denied Petitions on the basis of an actual change in legislation that makes the issue moot[4], Rosenfeld has found no reported cases where a Petition has been denied because of the existence of proposed legislation. In addition to the substantive arguments stated below that assume the proposed amendments will be enacted, Rosenfeld submits that the pro-

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[3] In the instant case, Rosenfeld abandoned dominion and control of his unit, and therefore would not fall within the scope of the proposed amendments. The Bankruptcy Court found that "the debtor is not in possession of the unit and has not occupied or possessed the unit at any time relevant to this case." (Pet. App. 6a). The Fourth Circuit reiterated this fact, stating first that "Rosenfeld acquired the River Place apartment as an investment and has never resided there," and second, that "Rosenfeld has asserted no ownership interest in the unit and has not leased the apartment to anyone since his bankruptcy petition." (Pet. App. 41a, Pet. App. 42a).

[4] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1954).

posed amendments should not affect the merits of Rosenfeld's Petition for a Writ of Certiorari since the legislation may never be enacted or may be enacted in a substantially altered form.

II.
THE PROPOSED AMENDMENTS WILL NOT RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SEVENTH CIRCUIT FOR DEBTORS WHO DO NOT FALL WITHIN THE LIMITED SCOPE OF THE AMENDMENT.

The passage of the proposed amendments will not resolve the conflict between the Fourth Circuit and the Seventh Circuit as to whether the post-petition assessments are discharged. Resolution of this fundamental issue is still necessary since the proposed amendments do not address whether post-petition assessments are a "claim" which is discharged for all debtors who do not fall within the scope of the proposed amendments. *See* 11 U.S.C. §727(b). If this fundamental issue is not addressed, the dischargeability of such assessments which are not included in the proposed amendments will still be dependent upon which jurisdiction the debtor is entitled to declare bankruptcy.

The number of cases that arise outside the scope of the proposed amendments are substantial, and not *de minimis* (as implied by River Place). The issue of the dischargeability of accruing post-petition assessments will arise again and again in situations not covered by the proposed amendments. The following scenarios would not fall under the proposed amendments:

(a) debtors such as Rosenfeld[5] who abandon investment property because the rental income

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[5]See footnote 3, *infra.*

does not equal or exceed the mortgage payments, cooperative assessments and other costs of ownership;

(b) debtors who cannot afford the costs of their primary residence and therefore move to more affordable accommodations;

(c) debtors who own single family residences that are neither condominiums or cooperatives but which are subject to homeowner's association assessments;

(d) debtors who abandon business property, which is subject to assessments, when they can no longer afford to continue operations;

(e) debtors who fall within the scope of the proposed legislation, but who filed bankruptcy before the effective date of the proposed amendments; and

(f) all debtors who own units subject to association assessments in the event the proposed amendments are not enacted by Congress.

Under the holding in *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990), the accruing assessments are discharged in each of the above scenarios. Under the Fourth Circuit's decision in this case, the accruing assessments are not discharged.

A decision by this Court is necessary to resolve the conflict between the Circuits as to whether assessments not addressed by the proposed amendments are discharged. By contrast, a denial of the Petition for Writ of Certiorari at this time will only result in the issue again being presented to this Court in one of the above fact patterns in the event of the passage of the proposed amendments. Judicial economy will be served by the granting of the Petition for a Writ of Certiorari and resolution of the issue at this time.

III.
CONCLUSION

River Place's argument that "taking action at this time is unwarranted, given the imminent actions of the legislature" is without merit. The proposed amendments may not be enacted, and even if enacted, will not solve the problem of the dischargeability of assessments except as to the limited scope of the proposed amendments. Only a decision affirming *In re Rosteck* and overturning the Fourth Circuit will manifest Congress' intent to provide all debtors who are not covered by the proposed amendments (as is the case with Rosenfeld) with a fresh start.

Respectfully submitted,

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APPENDIX A

103D CONGRESS
1ST SESSION

H.R. 1583

To amend title 11 of the United States Code to make nondischargeable debts for postpetition fees payable to a membership association with respect to the debtor's interest in, and for the period during which the debtor occupied, a dwelling unit that has condominium or cooperative ownership.

IN THE HOUSE OF REPRESENTATIVES

April 1, 1993

Mr. HYDE introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 11 of the United States Code to make nondischargeable debts for postpetition fees payable to a membership association with respect to the debtor's interest in, and for the period during which the debtor occupied, a dwelling unit that has condominium or cooperative ownership.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness to Condominium and Cooperative Owners Amendment of 1993".

SEC. 2. AMENDMENTS.

Section 523(a) of title 11, United States Code, is amended–

(1) in paragraph (11) by striking "or" at the end,

(2) in paragraph (12) by inserting "or" at the end, and

(3) by adding at the end the following:

"(13) for a fee that becomes payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium or cooperative ownership, if such fee is payable for a period during which the debtor occupied such dwelling.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.–Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS. – The amendments made by section 2 shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

APPENDIX B

AMENDMENT NO. 1635

(Purpose: To amend title 11, United States Code, to clarify that post-bankruptcy fees payable to a membership association with respect to the debtor's interest in a dwelling unit that has condominium or cooperative ownership are nondischargeable debts for the period during which the debtor occupied the unit or received rental payments for it)

Mr. THURMOND. Mr. President, I send an amendment to the desk for myself and Senator HELMS and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from South Carolina (Mr. THURMOND), for himself and MR. HELMS, proposes an amendment numbered 1635.

Mr. THURMOND, Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 235, between lines 13 and 14 insert the following:

SEC. 311. FAIRNESS TO CONDOMINIUM AND CO-OPERATIVE OWNERS.

Section 523(a) of title 11, United States Code, as amended by section 210, is amended—

(1) by striking "or" at the end of paragraph (13);

(2) by adding "or" at the end of paragraph (14); and

(3) by adding at the end of the following new paragraph:

"(15) for a fee that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, if such fee is payable for a period during a substantial portion of which—

"(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

"(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee for a period arising before entry of the order for relief in a pending or subsequent bankruptcy proceeding."

Mr. THURMOND. Mr. President, I rise today to offer an amendment to S. 540 to clarify an ambiguity in the Bankruptcy Code which has led to confusion, conflicting judicial decisions, and unfair outcomes in many cases. This amendment relates to bankrupt debtors who own condominium or cooperative units in a community association. It is necessary to correct a line of cases in which courts have held that future payments by the debtor to a community association are discharged in bankruptcy. This amendment simply makes clear that assessments by community associations which become due after the bankruptcy order for relief are not discharged, as long as the debtor receives the benefits.

Mr. President, today there are some 5 million condominium units in our Nation, in addition to cooperative units and other forms of community associations.

Together, these community associations represent a significant percentage of this country's housing. These associations are found throughout the country, with the highest concentration in Hawaii, where condominiums alone make up over 20 percent of the available housing. In addition, Florida, Connecticut, California, and Colorado have significant percentages of community associations, along with many other States.

The owners of units in community associations typically pay monthly fees to cover a broad range of services provided by the association. These fees generally pay for maintenance and repair of the condominium building and common areas. This ensures that the structure itself and all common areas, including elevators, heating and cooling systems, and similar elements, remain in satisfactory condition. In addition, the fees often pay for insurance, for maintenance of driveways and parking areas, for landscaping and for snow and trash removal. Significantly, in many cases the associations' assessment also covers the utilities used by individual units so that separate metering and billing is not necessary.

With the current ambiguity in the Bankruptcy Code, owners of units in community associations may be unfairly burdened by increases in their association fees if their neighbors declare bankruptcy and receive a discharge of the association fees which are due in the future. Some courts hold that these future fees are discharged in bankruptcy, so that the debtors need not pay their share of the expenses of the association even in the future after their bankruptcy is over and even though they continue to receive benefits from the association.

Courts which reach this conclusion have sometimes recognized that the result makes no sense, but feel that it is compelled by the Bankruptcy Code, which can only

be changed by the Congress. The Seventh Circuit Court of Appeals held in the matter of Rostek that future association fees were discharged so that the debtor was free from payments to the condominium association. The seventh circuit stated that the result was "troubling," but believed it was compelled by the language the Congress used in the Bankruptcy Code. That appellate court went on to explain correctly that it did not have the "power to change" that language to reach a more "palatable" result. However, in the Congress we do have that power and should exercise it to remedy this problem.

Some judicial decisions suggest that this problem is limited, for in many cases the condominium unit will be sold and the debtor will receive a free ride only for the time that it takes to dispose of the unit. However, in many cases there is no equity in the unit, so the trustee and the mortgage holder will allow the debtor to retain the unit indefinitely. While the association may have the right in theory to foreclose, in practice the mortgage holder will receive all of the recovery, so that the association will not even cover the attorneys' fees for its trouble. It is in these cases that the present system is most unfair and the need for my amendment is greatest.

This amendment would further the goal of the bankruptcy laws, which is to give debtors a fresh start by discharging their past debts while holding them responsible for any new obligations or benefits they obtain. My amendment allows all past debts owed to the community association to be discharged and simply requires payment of the assessments which become due after the bankruptcy order for relief, and only if the debtor actually receives the benefits by occupying the unit or receiving rental income from it. To further ensure that the purposes of the bankruptcy law are achieved, express lang-

uage has been added to the amendment to clarify that debts to the association are not discharged if the debtor later files a subsequent bankruptcy proceeding.

Mr. President, my amendment would make the Bankruptcy Code fairer and more equitable. The debtor's neighbors who belong to the community association will be treated much more fairly by avoiding the higher assessments which result from giving the debtor a free ride. The debtor will be treated fairly because the amendment does not affect the dischargeability of fees due prior to the final order of relief in the bankruptcy. Also, as I stated earlier, the amendment applies only to situations where the debtor benefits from the dwelling unit by occupying it or receiving rents from it, and in those instances the debtor should be required to pay the postbankruptcy assessments to the association.

For all of these reasons, I urge my colleagues to support this amendment.

Mr. President, both managers of the bill have agreed to the amendment. I urge adoption of the amendment, if it meets their approval.

The PRESIDING OFFICER. The Chair recognizes the Senator from Alabama.

Mr. HEFLIN. Mr. President, before we urge adoption, let me make a statement on this. I think this is an excellent amendment.

This amendment is designed to make clear that it is not the intention of Congress that a debtor be absolved of his obligations to continued payment of his share of common expenses due to his condominium or cooperative association which come due after he has filed bankruptcy.

It seems that some courts have interpreted section 523 of the code not only to discharge the debtor from liability for common area maintenance assessments which have come due prior to his filing bankruptcy, but for those debts coming due after the date of filing. This has severely impacted thousands of association members across the country by increasing their fees to carry the burden of those members whose obligations have been discharged in bankruptcy proceedings.

The current state of the law on this issue is quite confused. Some courts treat the obligation to pay future assessments based on a prepetition obligation as discharged in its entirety upon filing of a petition. Other courts hold that the postpetition assessments are not discharged because they have not become due at the time of filing. Still other courts reason that the postpetition obligations cannot be discharged because they constitute a covenant which runs with the land, which can be terminated only by terminating ownership interest.

This amendment will clarify the ambiguity that now occurs within the courts regarding association fees for condominium and cooperatives. It will make nondischargeable the membership association fees that become payable after the order for relief if such fee is payable for the period in which the debtor occupies the dwelling after the order for relief.

I am aware that presently seven States, and the District of Columbia have passed lien statutes which are directed at this problem.

For these reasons, I support this amendment.

I congratulate the distinguished Senator from South Carolina for bringing this to our attention because this is an example of why bankruptcy reform is an ongoing

situation, why we need a National Bankruptcy Review Commission, and why we ought to be able to address these issues as they arise, rather than having a great number of condominium association and cooperative memberships suffer as a result of it.

So I thank the Senator for bringing it to our attention.

Mr. THURMOND. I wish to thank the majority manager and the minority manager, too, on this bill.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, we accept the amendment on this side of the aisle. This falls into the category of which I spoke in my opening remarks on this particular bill and on the work of the National Bankruptcy Commission, that this is an example of fine tuning that from time to time a code must go under to recognize the economic realities of how we do business in this country and the changes from day to day.

The PRESIDING OFFICER. (Mr. LIEBERMAN). Is there further debate? If not, the question is on agreeing to the amendment.

The amendment (No. 1635) was agreed to.

Mr. HEFLIN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. THURMOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. I thank the Senator.

Mr. REID addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Nevada [Mr. REID].

Mr. REID. Mr. President, I received a fax yesterday in the form of a letter from an attorney in Reno, NV, by the name of Jeffrey Giles. I think, Mr. President, this sums up why we are here today.

DEAR SENATOR REID. I received a fax from the National Association of Bankruptcy Attorneys asking that I along with others communicate with you regarding the reform bill. I am not opposed to a prohibition on repeat filings. It would probably be a good thing.

I think here is the paragraph of importance.

However, the legislation in some form should be passed immediately. This reform measure has been in the works for nearly 2 years and the essence of it needs immediate enactment.

Good luck. I remain, sincerely yours, Jeffrey Giles.

The reason I mention this to the President and through you to the manager of the bill, the senior Senator from Alabama, is to congratulate him on his great work on this legislation.

I have spent time with the Senator's staff. They are well versed in the law. They are very easy to work with, and as a result of the work that I have been able to do with Senator HEFLIN and his staff, I think the bill is better than it would have been. Perhaps some of the matters that I suggested be placed in the bill would have eventually gotten in there anyway.

This bill that is now before the Senate is a good bill. I have a couple of amendments that I am going to offer. Mr. President, one of which is entirely relevant; one is not entirely relevant. But the mere fact that I am offering these amendments does not take away from the work

of the manager of this bill. I think the majority and minority on this matter have done very good work for the American people.